# THE RELEVANCE OF ECONOMIC INTEGRATION TO THE DEVELOPMENT OF THE EUROPEAN UNION'S HUMAN RIGHTS APPROACH

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

ÇİĞDEM ÇELİK

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
THE DEPARTMENT OF EUROPEAN STUDIES

APRIL 2021

Approval of the thesis:

**THE RELEVANCE OF ECONOMIC INTEGRATION TO THE DEVELOPMENT OF THE EUROPEAN UNION'S HUMAN RIGHTS APPROACH**

submitted by **ÇİĞDEM ÇELİK** in partial fulfillment of the requirements for the degree of **Master of Science in European Studies, the Graduate School of Social Sciences of Middle East Technical University** by,

Prof. Dr. Yaşar KONDAKÇI
Dean
Graduate School of Social Sciences _____

Assoc. Prof. Dr. Başak KALE LACK
Head of Department
Department of European Studies _____

Assoc. Prof. Dr. Başak Zeynep ALPAN
Supervisor
Department of Political Science and Public Administration _____

**Examining Committee Members:**

Assoc. Prof. Dr. Başak KALE LACK (Head of the Examining Committee)
Middle East Technical University
Department of International Relations _____

Assoc. Prof. Dr. Başak Zeynep ALPAN (Supervisor)
Middle East Technical University
Department of Political Science and Public Administration _____

Prof. Dr. Sanem Suphiye BAYKAL
TOBB University of Economics and Technology
Department of Law _____

**I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.**

**Name, Last Name:** Çiğdem ÇELİK

**Signature:**

## ABSTRACT

THE RELEVANCE OF ECONOMIC INTEGRATION TO THE DEVELOPMENT OF THE EUROPEAN UNION'S HUMAN RIGHTS APPROACH

ÇELİK, Çiğdem
M.S., The Department of European Studies
Supervisor: Assoc. Prof. Başak ALPAN

April 2021, 153 pages

This thesis intends to understand whether the European Union (EU)'s economic integration has had an effect on the development of its human rights approach by exploring the relationship between economic integration and human rights in the EU. To answer the research question of the thesis (has the EU's economic integration influenced the development of its human rights approach?) first, the historical evolution of human rights approach of the EU is outlined. Then, from comparative regionalism perspective, the relationship between economic integration and human rights in the Southern Common Market (Mercosur) is explored by reviewing the relevant literature to draw insights for the EU case as well as analysing this relationship in general. While Mercosur case highlights the distinct features of the EU path especially in terms of its institutional design and legal framework, it also reveals some common patterns with regard to the link of economic integration and human rights in regional integration projects that have a strong economic dimension. Lastly, the relevance of economic integration of the EU to its approach towards human rights, in

the light of the insights drawn from the literature review and the findings derived from the history of human rights of the EU, is examined. The thesis concludes with the argument that economic integration of the EU has had a significant influence on the route of the development of its human rights approach, along with several other components.

**Keywords:** The European Union (EU), human rights, economic integration, Southern Common Market (Mercosur), comparative regionalism

# ÖZ

EKONOMİK ENTEGRASYONUN AVRUPA BİRLİĞİ'NİN İNSAN HAKLARI YAKLAŞIMININ GELİŞİMİYLE İLİŞKİSİ

ÇELİK, Çiğdem
Yüksek Lisans, Avrupa Çalışmaları Bölümü
Tez Yöneticisi: Assoc. Prof. Dr. Başak Zeynep ALPAN

Nisan 2021, 153 sayfa

Bu tez, AB'deki ekonomik entegrasyon ve insan hakları arasındaki ilişkiyi araştırarak Avrupa Birliği'nin (AB) ekonomik entegrasyonunun Birlik'in insan hakları yaklaşımının gelişimi üzerinde bir etkisi olup olmadığını anlamayı amaçlamaktadır. Tezin araştırma sorusuna cevap vermek üzere (AB'nin ekonomik entegrasyonu Birlik'in insan hakları yaklaşımının gelişimi etkiledi mi?), öncelikle AB'nin insan haklarına yaklaşımının tarihsel gelişimi özetlenmektedir. Daha sonra, AB örneğini kavrayabilmek üzere, karşılaştırmalı bölgeselcilik perspektifinden ilgili literatür taranarak Güney Ortak Pazarı'ndaki (Mercosur) ekonomik entegrasyon ve insan hakları ilişkisi keşfedilmekte, ayrıca bu ilişki genel olarak incelenmektedir. Mercosur örneği, özellikle kurumsal tasarımı ve yasal çerçevesi açısından AB yolunun farklı özelliklerini vurgularken, güçlü bir ekonomik boyutu bulunan bölgesel entegrasyon projelerinde ekonomik entegrasyon ve insan hakları bağlantısına ilişkin bazı ortak kalıpları da ortaya koymaktadır. Son olarak, literatür taramasından ve AB'nin insan hakları yaklaşımın gelişim tarihinden elde edilen bulgular ışığında, AB'nin ekonomik

entegrasyonunun insan haklarına yaklaşımıyla ilgisi incelenmiştir. Tez, AB'nin ekonomik entegrasyonunun, diğer birkaç unsurla birlikte, AB'de insan haklarına yaklaşımın gelişiminin izlediği yolda önemli bir etkiye sahip olduğu savıyla sona ermektedir.

**Anahtar Kelimeler**: Avrupa Birliği (AB),insan hakları, ekonomik entegrasyon, Güney Ortak Pazarı (Mercosur), karşılaştırmalı bölgeselcilik

*To my family*

## ACKNOWLEDGMENTS

Firstly, I would like to express my gratitude to my advisor Assoc. Prof. Dr. Başak Alpan for her attention, guidance and patience. She has always been a considerate and supportive professor and advisor through the whole process of my study and research in METU European Studies Program.

I also would like to thank examining committee members Prof. Dr. Sanem Suphiye Baykal and Assoc. Prof. Dr. Başak Kale Lack for their corrections and valuable comments and contributions.

I further wish to thank my friends and my colleagues who have always encouraged me to write my thesis. Lastly, I owe special thanks to my family for their love and support throughout my life; I am grateful to have them.

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| CJEU | Court of Justice of the European Union |
| CoE | Council of Europe |
| EAEC/Euratom | European Atomic Energy Community |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECSC | European Coal and Steel Community |
| ECtHR | European Court of Human Rights |
| EDC | European Defence Community |
| EEC | European Economic Community |
| EPC | European Political Community |
| EU | European Union |
| Mercosur | Southern Common Market |
| NAFTA | North American Free Trade Agreement |
| OAS | Organization of American States |
| Parlasur | Mercosur Parliament |
| SEA | Single European Act |
| WTO | World Trade Organisation |

# CHAPTER 1

## INTRODUCTION

For more than half a century, the European Union (the EU) has been standing as a special kind of polity on the international scene, continuing to attract the attention of its observers. Putting aside the earlier united Europe ideals, the EU's roots goes back to one of the most dreadful experiences of the last century if not all human history: the World War II. After the War, with a vision to secure peace by ending rivalries among European countries and to reconstruct the war-torn continent, an integration process was set. Not only restoring economy and avoiding war with controlling heavy industries and atomic energy but also democracy, human rights and the rule of law were in the agenda of European integration. Despite the grand ideas regarding European unity, though, the inception of European integration was not the realisation of all aspirations that came with the wind of post-World War II climate. The Council of Europe (CoE), which deals with democracy, human rights and the rule of law, was established by ten European states (the United Kingdom, Denmark, Sweden and Norway in addition to "the Six") in 1949 as an intergovernmental organisation. On the other hand, "the Six" (France, Germany, Italy and Benelux countries) would take this cooperation a step forward by building a closer cooperation. First, coal and steel industries were regulated under an independent authority with the Treaty of Paris establishing the European Coal and Steel Community (ECSC) in 1951. In 1957, the European Economic Community (EEC) and the European Atomic Energy Community (EAEC/Euratom) were established with the Treaty of Rome. Through its vision of creating a closer union between member states and among their peoples, the Treaty of Rome not only established a common market but also a political community with supranational institutions.

From its early years, the EEC has constantly developed its law and institutions to cover numerous areas and it turned into a "union"-the EU- with the Treaty of Maastricht in 1992. The increasing economic and political integration within the EU was maintained after Maastricht. Due to its success in creating peace and prosperity, the Community attracted the attention of other European countries and it started to enlarge in 1973 with the joining of Denmark, Ireland and the United Kingdom. After the end of Cold War, it continued to widen while also deepening its integration by transcending the initial scope of its competences in economic, political and social realms. The progression that the EU has made includes the developments in the area of human rights. Yet, the exclusion of human rights provisions from the EEC framework evokes a curiosity concerning their gradual inclusion to the EU structure.

As Grainne de Burca's archival study demonstrates that the earlier plans of the EEC members were more ambitious in terms of human rights protection, as in other areas like politics, economy and defence (2011). In 1952, a treaty was signed to establish a European Defence Community (EDC), which was followed by signing of another treaty to establish a European Political Community (EPC) in 1953, as the CoE was not considered as an adequately equipped political organisation. However, plans regarding the EPC and its ambitious political agenda were abandoned after the EDC failed to be approved by the legislative branch of France in 1954. Based on her archival research, de Burca argues that human rights protection mechanisms of the draft EPC Treaty were more advance than the EU's current regime and this enthusiasm was given up because of a conscious decision that favoured a cautious and gradual progress, not because of disregarding the human rights issue altogether (2011). Still, since the end product of the 1950s'integration plans, which is the Treaty of Rome, did not envisage a human rights regime and a community as strong as it had been designed with the draft treaties of the EDC and the EPC, the subsequent steps taken to protect human rights within the EEC (the EU) requires elaboration.

Given the initial exclusion of human rights protection mechanisms from the EEC, the EU's increasing engagement with human rights brings into mind the question that under which conditions this abandoned plan could be materialised. Have the gradual development of the EU's human rights regime and the EU's evolved approach

in the area been realised because of a commitment to early ambitions of European integration? Or have there been other reasons that have inevitably propelled the EU to adopt a human rights agenda? If so, what could be those reasons? The nature of EU integration with its law and institutions and the path that it followed bring into mind the role that integration process might have played.

In the beginning, the EU had to install a solid foundation for its integration as a new kind of polity while subsequently the expanding and growing EU polity with new members and new competences faced greater challenges to claim its legitimacy by solving, and not creating, problems. In parallel to its increasing sphere of influence, both geographically and thematically, concerns with regard to human rights along with other issue areas became one of the most debated topics. The discrepancies between its internal and external human rights policies, inadequate level of protection of several rights and freedoms, different attitudes towards different countries and regions regarding human rights in its external relations as well as its controversial acts and policies in the area have been among the criticisms to which the EU has been subjected. In this vein, another line of argument indicates the reflections of the importance that has been attributed to the internal market in the EU on its approach to human rights. The way human rights are treated in a polity that of the EU's magnitude concerns not only Europeans. As a potent global actor, the EU also reaches lives beyond its borders. Thus, the relevance of economic integration to its human rights approach deserves a special consideration. It should be examined how has the EU's approach to human rights developed and how its integration process, with its assertive economic dimension, effected this approach.

The EU is a regional integration project that has a significant economic dimension in addition to its political aspect. Whereas an active engagement with human rights is not a common feature of regional cooperation and integration projects with both political and economic dimensions, and the EU is not designed to be an organisation with a competence on human rights, it still has a sophisticated human rights system. Although EU integration has had political and social dimensions, whether the gradual development of human rights is fully the result of its political ambitions or its robust economic dimension has had an effect on the process, attracts

one's attention. Therefore, it is gripping to link its economic integration to its human rights approach. In this regard, this thesis aspires to understand the relationship between economic integration and human rights in the EU and aims at exploring to what extent (and how) the EU's economic integration logic influenced the development of its human rights approach within the EU. Accordingly, the major research question of the thesis is; has the EU's economic integration influenced the development of its human rights approach? To find an answer to this question, the thesis also asks; how has the human rights system of the EU developed? What was the reason(s) for attributing an importance to human rights in the EU? Is there a relationship between economic integration and human rights? Are there similarities between the EU and other regional integration projects that has a strong economic dimension in terms of human rights or is the EU path unique?

Under the guidance of these questions, the development of the EU's human rights approach will be examined in relation with its economic integration by utilizing another case for the EU by adopting comparative regionalism perspective. Within this framework, the structure of the thesis will be covered what follows.

### 1.1. Structure of the Thesis

The thesis will start with an evaluation of the historical development of the EU's human rights approach in the EU in the Chapter 2. Beginning from the EEC, the main events and developments in the process and the current structure of the EU and its human rights system will be assessed. In this regard, the EU institutions' role in the process and important treaty changes will be covered. Thus, a ground will be prepared for arguing these developments to answer the research question of the thesis: has the EU's economic integration influenced the development of its human rights approach? The conditions under which the EU's human rights approach evolved will enlighten the EU's highly criticised economic rationales in the face of human rights.

Since the EU integration is marked by a strong economic dimension and this thesis aims at understanding the development of its human rights approach as a regional integration project with a strong economic dimension, the EU's human rights journey and its changing attitude in the field requires being read by a perspective that

links human rights to economic integration. Therefore, in Chapter 3, the relationship between human rights and economic integration will be explored in general and then in another regional integration scheme - in the Southern Common Market (Mercosur)- which includes both economic integration and human rights dimensions, by reviewing the relevant literature. For locating regional projects into global context, the EU and Mercosur cases will be dealt from comparative regionalism perspective. Consequently, the conceptual framework of the thesis will be based on comparative regionalism literature. At the end of the literature review, some insights will be drawn for examining the EU case. Adding on the findings of Chapter 2, Mercosur case will help to identify the features of the EU that set its boundaries regarding human rights. Contrasting legal and institutional frameworks of the EU and Mercosur will highlight the common patterns when it comes to the link between economic integration and human rights.

In Chapter 4, the relevance of economic integration of the EU to its human rights approach and to the developments in this area will be addressed. Combining the elements of the history of the evolution of the EU's human rights approach and the insights of the literature review, it will be argued that the EU's economic integration logic has had a decisive role on its human rights approach. For drawing this conclusion, first, the implications of the similarities and differences between Mercosur and the EU paths will be stressed. Then, the EU's human rights approach and its evolution's responsiveness to economic integration logic will critically be argued.

In the next section, methodology of the thesis will be pointed out.

## 1.2. Methodological Considerations

To be able to discuss the development of the EU's human rights approach with a view to discover the relevance of economic integration, I will use content analysis method since the main indicators of the evolution in the field of human rights are official documents, such as treaties and secondary law of the EU. Therefore, the main sources of data are legislation, other official documents and official web sites of the EU institutions. In addition to these primary sources, literature studies will be employed as secondary sources when they make evaluations and as primary sources

when they provide first-hand knowledge. Nevertheless, as Chapter 3 will review the literature on Mercosur's human rights approach and its relation and comparison with the EU, sources of this chapter will be mainly academic studies. The thesis will be explorative to the end that it tries to comprehend the weight of economic integration on the development of the EU's human rights approach in the Union.

Further methodological issues with regard to the employment of regionalism literature and Mercosur and the EU comparison will be covered in the progression of the literature review in Chapter 3.

# CHAPTER 2

# A HISTORICAL EVALUATION OF THE DEVELOPMENT OF THE EUROPEAN UNION'S HUMAN RIGHTS APPROACH

A historical view is always helpful as it enables comprehension of both past and today. Therefore, understanding the evolution of the EU's human rights approach as well as its current system of human rights in relation with its economic integration requires accounting for their history. In this regard, the present chapter will cover the EU's human rights journey from its beginning to the Treaty of Lisbon through examining main treaty amendments, secondary legislation, judicial documents, political statements and other EU activities. By doing so, it is intended to prepare a ground for discussion of the EU's economic integration's effect on its human rights system in the Chapter 4.

## 2.1. Introduction

From the outset, the EU has been a "community" with political goals, albeit the word "economic" in the European Economic Community. Consequently, its political and economic aspects have interacted throughout its integration process. This interaction, by all means, is meaningful in the context of the EU's human rights approach and it has implications for the evolution this approach. In connection with this, law and institutions of the EU that have shaped its integration process constitute important elements of the track of the EU in the field of human rights. While the legal framework of the EU set the boundaries of integration, institutional initiatives could bend these boundaries and had an influence on the evolution process of EU legal order. To put the developments with respect to human rights in a context, especially in

relation to economic integration, therefore, demands inquiring into the historical background of this approach by paying attention to law and institutions of the EU.

Certain events and conditions that have determined the course of integration also will help to understand how and why the EU has inserted more and more human rights protection mechanisms into its legal and institutional framework, and how its engagement in human rights relates to its economic integration. In this respect, internal and external forces behind the process will be addressed. Such an inquiry seems beneficial to better comprehend the Mercosur case, too. The view that will be presented in this chapter will enable to make sense of the differences and similarities between the EU and Mercosur regarding their human rights approaches. Exploring legal and institutional designs and the paths their integrations have followed along with the evolution of human rights approach of these two organisations are important to locate economic integration in the context of human rights protection. Distinguishing the features of their respective structures and roads will surely highlight the determinant role of economic dimension of integration on human rights. Thus, the historical background accounted in this chapter will lay the groundwork for the inquiries and the arguments of the remaining of the thesis.

### 2.2. Pre-Maastricht Period

The EU can be seen as "the child of a specific and probably unrepeatable historical conjuncture" (Hobsbawm, 1995, p.578). As a political project, European integration became possible as a consequence of different variables and the developments of 1950s towards a union were, in many ways, accidental (Judt, 2011, p. 17). Likewise, subsequent stages of integration were built unintentionally (p. 23). This unreproducible process owes its uniqueness to a special context, which was shaped by the post-war conditions that included political and economic issues (24 *et seq.*).

It is no mystery that the first European Community, the European Coal and Steel Community (ECSC), was established at a time coincide with the expiration of Marshall Aid and it was followed by European Economic Community a few years later. On the other hand, European integration also started with political aspirations,

which includes human rights as part of protecting peace and security. However, when political integration had lost its ambition after the failure of the draft European Political Community (EPC), which was put aside after France had declined to ratify the European Defence Community Treaty in 1954, it seems that the European Community looked away from human rights protection which was also engaged by the Council of Europe (CoE).

According to the orthodox account, the EEC focused on economic integration while it was leaving the task of protecting human rights to 'sister' organization, which is the Council of Europe (de Burca, 2011, p.2; de Burca, 2003, p.684). Still, though, the EEC also had a political dimension, which caused concerns in some European countries, such as Sweden, Austria and Switzerland for the membership on the ground that it might jeopardize their neutral standing (Anderson, and Hall, 1961, p.9). In the context of human rights, the alternative story's argument which maintains that the silence of the founding treaties was a conscious decision to adopt a cautious approach in terms of creating a closer integration as a contemporary solution to the risk of endangering the achievement in hand (de Burca, 2011) is one of the reflections of this political dimension.

In spite of the EEC's political weight, after the separation of twins at birth (Quinn, 2001, p.849), the CoE and the EEC performed different tasks and the protection and promotion of human rights were mainly undertaken by the CoE. But especially following its establishment with the Treaty of Maastricht in 1992, the EU started to develop its own human rights system independent from the CoE (de Burca, 2003, p.683). Until Maastricht, however, the roots of this system had already taken in a gradual way. The gradual development of the basis of the EU's human rights system after the Rome Treaty owes so much to the creation of a mythic discourse by the EU institutions (Williams, 2010, p.110).

According to Smismans, a political myth is "a narrative that is at least partially based on non-rational elements and contains factual error, but is rather hegemonic as a shared belief of foundational principles of a polity, which refers to the past but spurs action in the political domain today" (2017, p.16). However, "the mere fact that the myth contains factual error does not make it a bad thing" (Smismans, 2010, p.16).

Indeed, myths might be helpful by enabling to leave the past behind and by making promises for the future, and moreover can be successful to a certain degree as in the case of post-World War II Western Europe (Judt, 1994). That is because of a narrative's ability to make people act upon, and thus, to pave the way for change" (Smismans, 2010, p.57; Smismans, 2017, p.16 ). For the EEC, the myth was that it was the centre of Europe and it was for all Europeans (Judt, 2011, p.41-42).

Legitimisation function of a political myth should also be noted (Smismans, 2010, p.16). In terms of human rights, the "retroactive" narrative that human rights were among founding principles of the Community constructed by the institutions over time in their search for "authenticity" (Williams, 2004, p.139).

The sui generis nature of the EU as a polity required it to seek a distinct way to legitimate itself to be able exercise power (Williams, 2004, p.129-137). To this end, it moved beyond law, which does not possess the ability to acquire legitimacy on its own, and created a value discourse for acquiring social legitimacy by deploying human rights in addition to democracy, the rule of law and free market (p.129-137). After World War II, as human rights were deemed indispensable for legitimacy of any kind of polity both internationally and regionally and arguments on economic grounds were not enough, a political myth through rhetoric and law was formed (p.129-137). The rhetoric disregarded the silence of treaties on human rights relying on history that transcended the limits of the wording of treaties (Williams, 2004, p.141). Against this backdrop, human rights discourse started to take shape in the EU.

### 2.2.1. Towards a Human Rights Discourse: The Role of the EU Institutions

Today, the European Parliament, the Council of the European Union, the Court of Justice of the European Union (CJEU), the European Commission are the main institutions of the EU and predecessors of these institutions were first established by Treaty of Paris setting up the European Coal and Steel Community (ECSC) which was

signed in 1951 and entered into force in 1952.[1] The Treaty of Rome, which refers to the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom), was signed in 1957 and entered into force in 1958, also set up Community institutions. After almost a decade, in 1965, the Brussels Treaty (the Merger Treaty) establishing a single Council and single Commission of the European Communities was signed to unite the ECSC, the EEC and Euratom. The Treaty started to have its affect in 1967.

Among abovementioned EU actors, the CJEU is maybe the one that has been articulated the most in the context of human rights achievements of the EU as the main contributor. Although each of the EU institutions took part in the process and their actions and approaches paved the way for Treaty changes, the case-law of the CJEU was the one which formed the Treaty provisions with regard to human rights. Therefore, the story of the evolution of human rights in the EU should commence with the CJEU's case-law as it constitutes a basis for comprehension of further developments.

#### 2.2.1.1. The Court of Justice of the EU

The CJEU (initially the European Court of Justice-ECJ) is commonly considered as one of the engines of the European integration. At the outset, CJEU was given such vast competence in article 164 *et seq.* of the Treaty of Rome that equipped it as the guardian of the Community legal order. Consequently, it became the main actor with regard to Treaty "interpretation and application" and thus, played a major role in forming the Community law, including human rights law, although it was not named as such in the initial process.[2] In terms of the CJEU's human rights protection,

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[1] The Assembly, the predecessor of the European Parliament; the Council, the predecessor of the Council of the European Union; the Court of Justice, the predecessor of the Court of Justice of the European Union; the High Authority, the predecessor of the European Commission.

[2] "The term 'fundamental rights' is used in a constitutional context in the European Union to express the concept of 'human rights' which is the term used in international law." https://eur-lex.europa.eu/summary/glossary/human_rights.html. In this thesis, the term "human rights" is preferred to encompass "fundamental rights" as a broader term except for the times that requires the specific use of "fundamental rights".

though, there has been criticism on the grounds that the EU relied on judicial remedies for a long period of time (Alston, and Weiler, 1999, p.12-13) and EU law experienced an *ad hoc* development as it developed its attitude towards human rights according to the case in hand (Ahmed, and de Jesús Butler, 2006, p. 774; Douglas-Scott, 2011, p. 680) which leaded to a certain degree of incoherence (Keskin Ata, 2013, p.18).

Actually, in the EEC's early years, the Court did not consider itself responsible for protection of fundamental rights since its priority was not protection of these rights *per se.* When it first encountered with the issue in 1958 (*Stork and Cie*., C - 1/58 of 4 February 1959) it concluded that national laws, and consequently, fundamental rights that were enshrined thereof, could not be regarded as a source of Community law. However, in the cases that followed within almost fifteen years the attitude of the Court started to change. We should begin with *Van Gend en Loos* Case to trace this changing attitude, which adopts the "direct effect" of Community law, in 1963 (Case 26/62, 1963, ECR 1). The following year, the Court went one step further and introduced another principle in *Flaminio Costa* Case: "the precedence of Community law", in other words "supremacy". According to this principle, it "could not, because of its special and original nature, be overridden by domestic legal provisions" (Case 6/64, 1964, ECR 585). It simultaneously pointed out the unique nature of the Community law, as it "became an integral part of the legal systems of the Member States and which their courts are bound to apply." In these two cases, the Court also highlighted the unique nature of the Community law, which invented a new legal order, by stating its difference from other international legal systems. Via guarding the Community legal order the Court established some of the most important principles of EU law.

Abovementioned cases paved the way for the CJEU's case-law concerning fundamental rights protection. Starting with *Stauder* in 1969 (Case 29/69), the Court regarded the fundamental human rights as part of the general principles of Community law.[3] Building on its previous cases thus far, it continued to take into consideration

[3] Today, respect for fundamental rights is regarded as one of the general principles of EU law along with equality, proportionality, legal certainty, non-retroactivity, legitimate expectation etc. Respect for human rights is also enshrined in the TEU as one of the founding values of the Union.

fundamental rights and in *Internationale Handelsgesellschaft* Case in 1970, it stated that

> respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community (Case 11/70).

Afterwards, with *Nold* Case in 1974, the Court started to refer international human rights treaties, especially the European Convention on Human Rights, to which the Member States were party and acknowledged them as guidelines for the Community law (Case 4/73, 1974). From then on, European Convention on Human Rights became a source of reference and its provisions were openly articulated for determining the limits of restriction of fundamental rights.[4] Thus, human rights discourse entered in the Court's jurisprudence, and as a result, in the Community's agenda.

So, why then the Court did not establish this case-law from the beginning? In the light of the foregoing, although it cannot be denied that the Court certainly played an important role in terms of promoting human rights as one of the foundational values of the EU and the earliest institutional initiatives were taken by the Court, putting the CJEU at the heart of the EU's human rights story 'as a heroic and solitary actor' is a questionable account (de Burca, 2011, p. 1-2, 22). There are several arguments that can explain the Court's divergence from its initial case-law. Firstly, when backgrounds of the abovementioned cases, which initiated the process of making respect for fundamental rights one of the founding principles of the Community, is examined, it can be seen that human rights protection was not the Court's only concern and it provided a basis for promotion of integration especially by defending the supremacy of EU law (de Witte, 1999, p.869). Seemingly, human rights protection was partly an indirect consequence of defending the position of Community law in the face of Member States. Therefore, fundamental rights could not be protected in the cases that

[4] For instance, see, Case 36/75, *Roland Rutili, v. Minister For The Interior*, 1975; Case 130/75, *Prais v. Council*, 1976; Case 44/79, *Hauer v. Land Rheinland Pfalz*, 1979.

might risk the Community's interests (Silvia, 2012, p.323). In this respect, what first comes to mind is protection of market freedoms (and economic dimension of integration) in the face of fundamental rights. The natural corollary to EU primary law, which focused on market freedoms especially in the early years of integration, is that protection of fundamental rights unavoidably has been of secondary importance in the EU, as it will be discussed in Chapter 4 in more detail.

Secondly, it can be argued that there had been a competition between judicial actors in the liberal international community in terms of defending and thus advancing human rights in the EU, and the CJEU was not the sole judicial institution that promoted the human rights framework in the EU (Schimmelfennig, 2006). It is argued that the CJEU can even be considered as the weakest in the initial process when compared to national constitutional courts, German and Italian courts in particular, of Member States and European Court of Human Rights (ECtHR) as it did not have an explicit competence with regard to human rights (Schimmelfennig, 2006, p.1251; de Witte, 1999, p.869). On the other hand, it is also maintained that despite the emphasis of human rights in their post-Nazi and post-fascist constitutions of Germany and Italy respectively, the CJEU's human rights protection was not less advanced than German and Italian constitutional courts, whose records in the field were not as strong as it thought in 1950s and 1960s (Fabbrini, 2016, p.15-16). Similarly, ECtHR's case-law was quite insignificant in its first thirty years as argued by Fabbrini (2016, p.13). This had a close relationship with the fact that the creation of the ECHR in 1950 was mostly related to the international environment of Cold War and only in the course of time, it became a refined legal international human rights mechanism (Madsen, 2007, p.138). Eventually, however, this pluralism in EU human rights law and "friendly interplay" between ECtHR and the CJEU brought about a positive outcome in terms of human rights protection and promotion (Krisch, 2008, p.200). From this point of departure, this outcome was unintended, and was not a consciously directed towards, for instance, a federalist constitution-making process (Schimmelfennig, 2006, p.1262). Nor does the CJEU seem to have protected fundamental rights because of their autonomous value, particularly given the limits of its competence on the issue in the period of the Treaty of Rome.

The human rights related case-law of the CJEU emerged in such context and these readings of the CJEU's jurisprudence within the context of human rights protection illustrate the contingent nature of human rights evolution in the EU. This contingency has been mainly upon the CJEU's efforts to defend its and thereby the EU's and EU law's position and assert their legitimacy while also competing with constitutional courts of member states and the ECtHR as a consequence of pluralist human rights protection system in Europe. On the other hand, due to the fact that the economic rationale constitute an important aspect of integration and that it also has implications for political dimension of the project, securing integration and defending EU law by protecting human rights among other principles have been in close connection with this economic dimension, which has necessarily influenced the process of developing the EU's human rights approach. To sum, the EU's economic integration logic has been a formative element in the way that the EU deal with human rights protection issue as securing integration via reinforcing community law also requires due consideration to economic dimension of integration, as it will be discussed in the Chapter 4.

Overall, it is suffice to conclude at this point that the CJEU's jurisprudence has been definitive in the Union's human rights journey and the history of its approach to the issue hints the EU's prevailing line of conduct regarding protection of human rights.

#### 2.2.1.2. The European Parliament

The predecessor of the Parliament, the Assembly, had restricted powers allowing it to take part in the law-making process as far as it was envisaged by a specific Treaty provision while the Council and Commission were leading actors in the institutional setting created by the Treaty of Rome (Craig, 2011, p.43). Consequently, the Parliament had had a secondary place in the institutional framework of the EU almost until 1970s (Schütze, 2012, p. 9). However, its role has been of great importance especially since the coming into force of 1976 Election Act as it introduced new provisions that made it more democratic by enabling the people of Europe to

directly elect their representatives.[5] In terms of gaining real legislative power, though, it had to wait for the entering into force of the Single European Act in 1987 (Craig, 2011, p.56).

In its active years, it has always played an important role in promoting human rights through placing them in the centre of its activities and through using numerous tools (Lausegger S. and Rack, 1999, p. 804). The Joint Declaration of 1977 was came into being with efforts of the Parliament (p.805). In 1977, the Parliament also adopted the Resolution on the Granting of Special Rights to Be Citizens of the European Community in implementation of the decision of the Paris Summit of December 1974.

In its Resolution on the Accession of the European Community to the European Convention on Human Rights in 1979, the Parliament supported the accession of the (then) Community to the ECHR. With the same Resolution, it also projected a Committee of Experts to draft a European Charter of Civil Rights.

In its Draft Treaty establishing the European Union of 14 February 1984, also known as "Spinelli Report", the Parliament acknowledged the importance of human rights within the Community order. In the Preamble of the Draft Treaty, commitment to human rights was declared while it contained a separate "fundamental rights" title. Under this title, economic, social and cultural rights were ensured as well as civil and political rights. The references were made to ECHR and European Social Charter (ESC) in addition to the common principles of the Constitutions of the Member States. The Draft Treaty also envisaged the Union's accession to ECHR, ESC, and to the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Moreover, it was envisioned that the Union would adopt a declaration on fundamental rights and a sanction mechanism was set up for serious and persistent violation of fundamental rights by a Member State. Lastly, respect for human rights was also specifically mentioned with regard to the Union's international relations. The effects of Spinelli Report can be observed in the subsequent developments in the EU's

[5] Article 138 of Rome Treaty envisaged that "The Assembly [European Parliament] shall consist of delegates who shall be designated by the respective Parliaments from among their members in accordance with the procedure laid down by each Member State." This procedure is more similar to "(international) "assembly"" model while the variation of the number of representatives of each country and elections by direct universal suffrage draw it nearer to national models. (Schütze, 2012, p. 10.)

human rights journey. Today, "Altiero Spinelli and the work done by the Committee on Institutional Affairs coordinated by him are considered to have had a vital influence on the process of building the European Union" (European Parliament, September 2006, p.7).

However, De Gucht Report (European Parliament, 1989b), which introduced a list of human rights for the first time in the Community, took the issue independently from constitutional context unlike Spinelli Report. Although the Single European Act had already put an emphasis on fundamental rights in its Preamble when the Parliament declared abovementioned list of fundamental rights and freedoms in 1989, Parliament's Resolution adopting the Declaration of Fundamental Rights and Freedoms (De Gucht Report) was significant not only because of being first Community document listing human rights but also because of its content which covers collective social rights, rights with respect to working conditions, environment and consumer protection, social welfare in addition to the rights protected by ECHR. Late in the same year, the Parliament adopted the Resolution on the Community Charter of Fundamental Social Rights (European Parliament, 1989a). In the Resolution, it was stated that social rights were among fundamental human rights.

The instruments of the Parliament was not limited with declarations and draft treaties. It has been preparing annual reports on human rights issues in the world since 1983.[6]

The Parliament continued to promote human rights in its activities while its role gradually enhanced by each treaty change.[7]

As illustrated by the works of Spinelli who is one of the most prominent figures of the idea on a united Europe and the EU, activities under the roof of European Parliament, which has been consisting of democratically elected members for decades, may be regarded as more genuine efforts to protect and even promote values like

[6] Strikingly, however, it started to prepare reports on human rights situation in the Union only since 1993.

[7] Afterwards, a Draft Constitution for the European Union (Herman Report) listing "human rights guaranteed by the Union" under a separate title was adopted by a Parliament resolution in 1994. As in De Gucht Report, the Draft also included provisions with respect to social rights.

human rights. Also important is that the works of the Parliament intended to create a strong social dimension for the EU and its people, which is apparently seen necessary for balancing liberal market economy.

#### 2.2.1.3. The Council of the EU

The Council had been the main legislator of the Union before the Parliament's legislative powers were improved (Schütze, 2012, p. 25). As the Treaty of Rome had provisions against discrimination based on nationality and gender with respect to four community freedoms and authorized the Council to make regulations, issue directives, take decisions and to make recommendations or deliver opinions (Article 189) the Council issued ten directives between 1975 and 2006[8], five of which are as early as 1970s and 1980s, on ensuring gender equality while exercising certain economic and social rights in connection with market freedoms.

To all appearances, the Council has not conducted an institutional activism regarding human rights, which is a feature that is usually attributed to the CJEU. Remarkably, market freedoms, which were granted for creating a common market, were the point of departure for the Council directives. Again, it should be noted that the limits set by primary law defined the boundaries of the Council's competences. Because of this reason, it is natural for it to stay in the limits of founding treaties. Yet, directives of the Council provided a solid basis for the development of a of case-law on equality and non-discrimination by the CJEU, which has contributed to the social dimension of integration and to the overall human rights protection within the Union.

#### 2.2.1.4. The European Commission

As the executive body of the Union, the Commission has not been a leading actor with regard to human rights. Its most prominent activity in the field was its Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms (COM (79) 210 final, 2 May 1979).

[8] See, List of Council Directives above.

In addition to the Memorandum, "Protection of Human Rights" was one of the concerns of 1975 Report of the Commission on European Union (para.82-85). According to the Report, "the protection of human rights is a fundamental element in the new political edifice and in the operation of its institutions" (para.82). The Report referred to the silence of treaties on human rights and the CJEU's efforts "to fill in this gap", and advocated for their formal recognition with law (para.82) and for adopting a list of rights for the Union or at least a general obligation to respect human rights (para.83). It also emphasized the special importance of economic and social rights by suggesting the limits of referencing to the ECHR as an alternative way for protecting human rights in the Union (para.83).

Also, the Commission's Community Charter of Fundamental Social Rights of Workers, which can be seen as a complementary part of single market plans, was adopted in 1989 at the European Council of Strasbourg. The Charter was prepared by the Commission's President Delors who convinced the heads of states to adopt it possibly with the intention of preparing the ground for future treaty provisions (Quinn, 2001, p.866). No doubt that the agenda that was set in the late 1980s with regard to economic integration was an important motivation for this effort. This is among salient examples regarding the interplay between economic and social dimensions of integration and economic integration's relevance to the rights issue within the EU.

#### 2.2.1.5. Other Institutional Initiatives

The works within the European Council, which was not a Treaty based institution until the Lisbon Treaty, also included human rights issues. In 1976, the Report to European Council by Prime Minister of Belgium, Leo Tindemans, (Tindemans Report) was proposed that there should be institutions to ensure recognition and protection of fundamental rights and freedoms, including economic and social rights in a way that individuals can directly appeal to the CJEU against EU actions in breach of their rights and freedoms. In 1985, the *ad hoc* Committee on a People's Europe (Adonnino Committee) prepared two reports, which addressed citizen's rights, and the reports were deemed appropriate by the European Council of Brussels to act upon in 1985.

In 1978 European Council of Copenhagen, a Declaration on Democracy was adopted which attributed human rights a special status by stating that "the principles of representative democracy, of the rule of law, of social justice and of respect for human rights" to be protected and "representative democracy and human rights are essential elements of membership of the European Communities." However, in spite of its importance, this might be seen as a mere rhetoric rather than providing an actual protection for human rights.

Within the context of the contributions of EU institutions to creating a human rights discourse, it should be mentioned that Joint Declaration of 1977 by the European Parliament, the Council and the Commission was an important step forward committing to set a human rights agenda. It is especially important as it was declared by all institutions that they "stress the prime importance they attach to the protection of fundamental rights" by also referencing CJEU's fundamental rights approach as part of EU law. In the light of this development, it can be inferred that the CJEU's approach to human rights contributed political discourse developed thus far and it was willingly adopted by other institutions (Williams, 2004, p.151-3). Also, the declaration can be considered as "the first major rhetorical movement to fuse the forces of law and rights into the very core of the Community" (Williams, 2004, p.151). In this sense, it can be argued that human rights became one of the elements that informed the course of integration while also having been informed by it as they were construed under the terms of the intentions with regard to the integration route.

As seen above, the institutions of the EU have played a vital role concerning the development of the Union's human rights approach, albeit within the constraints set by the founding treaties. The institutional initiatives, of course, have been important thanks to the supranational character of the EU's institutional design. This design made it possible for the EU institutions to have an actual effect on course of integration. Their actions and discourses also became sources and foundations of future developments, especially in terms of treaty changes, regarding the EU's human rights approach.

### 2.2.2. Treaty Provisions with regard to Human Rights Prior to Maastricht

Despite the relatively silent period of the EU in its early years on human rights issues, from the Treaty of Rome to the Treaty of Lisbon, the traces of human rights evolution of the Union can be followed.

Legal changes should be read with the corresponding political climate. Political change did not only have an impact on the Court but also on political institutions in terms of law-making (de Burca and Craig, 1999, p.4). In particular, decisions regarding human rights has always had a preceding narrative in the EU Williams, 2003, p. 676). Economic rationales, on the other hand, have been definitive for political decisions and treaty changes, as well. That is, economic and political aspects of the EU project have been of relevance for each other, and for human rights.

Before looking into Treaty changes, the original Treaty, the Treaty of Rome, should be reviewed in the context of human rights.

#### 2.2.2.1. The Treaty of Rome

In spite of the lack of a comprehensive human rights framework of European Communities, there were several articles in the Treaty of Rome (1957), which established the European Economic Community, with regard to human rights (Articles 7, 40, 48, 52, 59, 60, and 119). First provisions that fall within the scope of human rights protection were related to four freedoms of the market: free movement of goods, persons, services and capital. These provisions intended to ensure "development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it" (Treaty of Rome, Article 2). From this perspective, non-discriminatory clauses, namely the principle of equal payment for men and women for equal work and prohibition of any discrimination on grounds of nationality, mainly served as common market values and the purpose of incorporating anti-discriminatory provisions into the Treaty text was mainly to regulate economic life, as the Treaty set up an economic community. Adding a social dimension to the economic community came into the agenda because of national social policies. Especially Article 119 aimed

at protecting France and the social standards of her against community regulations. (Keskin Ata, 2013, p. 19; Quinn, 2001, p.861).

Still, prohibition of discrimination based on gender and nationality with the Treaty of Rome was the beginning of the EU's approach to equality as part of human rights. Thus, the CJEU's case-law on equal treatment has developed significantly since the early years of the Community. It can be argued that the Treaty's focus on equality leaded to extend the grounds of non-discrimination as well as to prove the importance of equality for market economy (Quinn, 2001, p.861). While this paradigm confined rights protection in economic context, it also enabled to set conditions for developing a more comprehensive understanding regarding human rights.

Institutions had played their role through creating a human rights discourse, and actively protecting them in the case of the CJE, by the time of the of internal market discussions in the 1980s. It was the time for enshrining this discourse to the provisions of Treaties.

#### 2.2.2.2. The Single European Act: beyond mere discourse

Although CJEU had been very active in terms of human rights related developments in its case-law in 1960s and 1970s as mentioned above, the same period was marked by political inactiveness (de Burca and Craig, 1999, p.15). Parallel to this, there was not a comprehensive treaty amendment until the Single European Act (SEA) was signed in 1986. This inertia changed in 1980s with an aim to complete internal market. The economic climate was an important motive for creating an economic agenda. Following 1973 Oil Crisis, Europe's economic integration started to experience a severe slowdown, which triggered the realization of single market goal in the 1980s. Maybe because of this major aim, it gained support from all Member States (de Burca and Craig, 1999, p.19). It was envisaged by the Act that "The Community shall adopt measures with the aim of progressively establishing the internal market over period expiring on 31 December 1992" (Article 13). Despite its

economic tone, the Act also brought about several important reforms[9] and ushered an acceleration period for integration which would last about two decades (de Burca and Craig, 1999, p.15). The political dimension of this process of change contained human rights issue as one of the most important elements and the first step for human rights protection at treaty level was taken with the SEA.

Aside from non-discrimination provisions of the Treaty of Rome in connection with four freedoms of the Community order there had not been a provision that can be considered as related with human rights. The SEA's mention on human rights filled this gap, albeit in its Preamble. In the Preamble of the Act it was stated that Member states were

> determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States in the Convention for the Protection of Human Rights and fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

The preamble's reference to the constitutions of Member States and ECHR and ESC affirmed the jurisprudence the CJEU. Thus, the CJEU's fundamental rights narrative was formally recognized in the Treaty text. However, this was only the harbinger of more comprehensive and detailed Treaty amendments, which would be witnessed in the years to come.

### 2.3. Maastricht and the Road towards Lisbon

After the flare gun was shot by the SEA, the acceleration of integration process furthered by fundamental modifications of the Treaty of Maastricht. From that time to the adoption of the Treaty of Lisbon, the EU experienced a rush towards realizing further integration.

While the SEA was mainly economy-focused, following Maastricht, political integration gained importance during 1990s. Certainly, developments in the 1990s

[9] Some institutional reforms were; extending qualified majority procedure of the Council, establishing European Council, enhancing the Parliament's powers, bestowing the Commission some powers for the implementation of the rules laid down by the Council, founding the court of first instance attached to ECJ (Article 4) etc. also, new policy areas were introduced: economic and social cohesion (Article 23), research and technological development (Article 24), environment (Article 25). New provisions with regard to social policy (Article 21) and Co-Operation In Economic And Monetary Policy Economic and monetary Union (Article 20), Co-Operation in the Sphere of Foreign Policy (Article 30).

were closely linked with the post-Cold War process. After the fall of Berlin Wall in 1989, the possible membership of Central and Eastern European countries to the EU had been decisive in agenda setting within the context of human rights as one of the values of the EU. Additionally, legitimacy crisis of the EU polity in the 1990s was an important element that would shape the reforms throughout the years that resulted with the Treaty of Lisbon in 2007. During these years, popular discontent and the idea of constraining an expending polity were the reasons for legitimacy search. Thus, it is imperative to see the developments of 1990s, especially in terms of human rights, in the light of the efforts for regenerating integration and legitimating the Union along with the new international environment with a prospective eastern enlargement.

### 2.3.1. The Treaty of Maastricht

In December 1990, two Intergovernmental Conferences (IGCs) were held: one on Economic and Monetary Union (EMU) and one on political union. The European Council's decision to hold an IGC on political union, in addition to the IGC on EMU, seems as a balancing solution for the predominance of economic integration (de Burca and Craig, 1999, p.15). The IGC on political union covered the issues of political legitimacy, common foreign and security policy, extension and strengthening of Community action, European citizenship, effectiveness and efficiency of the Union (European Council Rome, 1990). Against this backdrop, the Treaty of Maastricht was signed in 1992 addressing the issues in the IGC. It started to take effect in the following year.

The Treaty could be considered as "a big bang moment" (de Burca and Craig, 1999, p.42) as it created the European Union and the well-known three-pillar structure.[10] Although it mostly concerned with full economic and monetary union, human rights found a place within the context of political integration efforts. Human

[10] Three Communities that were established by ECSC, EEC and Euratom Treaties became the first pillar as "European Communities" which had supranational character. Other pillars, Common Foreign and Security Policy and Cooperation on Justice and Home Affairs pillars, on the other hand, had intergovernmental character. The Justice and Home Affairs pillar can also be considered as hybrid since issues like immigration and visa are difficult to classify as purely supranational or intergovernmental (de Burca and Craig, 1999, p.4).

rights issue of the EU came to the fore mostly because of the crisis with regard to integration (Quinn, 2001, p. 865-6).

Maastricht not only confirmed the Union's "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law" in its Preamble but it also envisaged, in compliance with the CJEU case-law, that:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and as they result from the constitutional traditions common to the Member States, as general principles of Community law (Article F(2)).

With Article 8, the Treaty introduced the Union citizenship that was common to the nationals of the Member States and it envisaged several rights and duties for the citizens of the Union. The rights of the Union citizens included: the right to move and reside freely within the territory of the Member States, the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State Member States, the diplomatic or consular protection in third countries, the right to petition the European Parliament in accordance with Article 138e and the possibility to apply to the Ombudsman which was established by Article 138e.

The focus on citizenship rights were strictly related with the legitimacy issue. Read as such, introduction of Union citizenship and related rights were a consequence of the new direction of integration which started with the single market vision set out in the SEA and the increasing visibility of the Union as a result of its growing and extending competence (de Búrca, 1996, p.350).

In relation with the EU's increased competence, there had been concerns in member states with respect to their control over integration (Carozza, 2003, p.51). Consequently, subsidiarity principle was enshrined in Maastricht. After Maastricht, however, the issue continued to be discussed and one line of argument with regard to the EU's legitimacy problem was around the principle of subsidiarity, which was interpreted differently by different actors (de Búrca, 1996).

The principle has also implications for human rights. As a result of subsidiarity principle, the CJEU has had to balance rights protection with member state

sovereignty, albeit under certain conditions like pursuing public interest (Shelton, 2003, p.135-36). Therefore, while subsidiarity principle allows the CJEU to apply its jurisdiction where member state measures are inadequate, it also gives member states a substantial competence on human rights issues (p.135-36). From a different point of view, subsidiarity and fundamental rights have a common feature in the EU constitutional discourse as they are both argued in the context of equilibrium between European and national levels (Carozza, 2003, p.52).

As to the EU's external relations, "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms" was listed among "the objectives of the common foreign and security policy" (Article J(1)-2) in the Treaty.

Finally, Article 130u-2 on development cooperation stated "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

Maastricht represents a significant step in the EU's human rights approach's development history, as seen in the abovementioned provisions, which altered the initial framework of the Treaty of Rome regarding human rights dramatically.

In spite of the importance of the Treaty, the result was complicated and was not quite compatible with what had been expected from integration (de Burca and Craig, 1999, p.22). The "flexible or differentiated integration" in Maastricht represented a line of conduct in European integration process which continued with Amsterdam, and then with Nice (de Burca and Craig, 1999, p.22-28). In Amsterdam process, steps taken more carefully: "consolidation" and "effectiveness" were the key words instead of "extension" and "expanding" competence and power, and in this sense, its targets were strategically chosen (p.22-28).

### 2.3.2. The Treaty of Amsterdam

Immediately after the Treaty of Maastricht was signed, an uproar was risen which brought the legitimacy problem into the light since peoples of Europe who experienced the effects of economic integration were neglected by the EU's market-

focused perspective (Quinn, 2001, p. 867). Popular legitimacy problem became a hot topic during the problematic ratification process of the Maastricht Treaty (De Búrca, 1996, p. 349.) Therefore, to regenerate the legitimacy, "people's Europe" discourse, which had been started to discuss by European elites in early 1990s, came to the fore by embedding human rights into the discourse (Quinn, 2001, p. 867). The Member States and the European Commission started to use human rights as part of their efforts to overcome the legitimacy problem and disconnection of policies from people (De Burca, 2003, p.687).

From another point of view, the discontent deriving from Maastricht was not surprising, given that the obscurities and tensions that had been intrinsic in the integration project since its inception, as in the creation of pillar structure blending intergovernmental and supranational properties, had been reserved in the Treaty of Maastricht (de Burca and Craig, 1999, p.22).

Also, as it was pointed above, the prospective eastern enlargement helped forming the way in which the EU conduct itself. Consequently, treaty amendments were made by taking into consideration the future members of the EU. Therefore, human rights provisions of Amsterdam should be read in relation with enlargement (de Burca and Craig, 1999, p.15). As human rights had become one of the *de facto* membership conditions with the European Council of Copenhagen in 1978[11] and Copenhagen criteria had already been formulated by the European Council of Copenhagen in 1993, even before it had a formal basis in treaties, their employment in the context of eastern enlargement and pre-accession amendments was in compliance with what could be expected.

In this background, the Treaty of Amsterdam was signed in 1997, entered into force in 1999, and human rights provisions enshrined in the Treaty. Remarkably, it was envisaged in Article 6(1) of the TEU that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the

[11] After World War 2, human rights were not only occupied debates with regard to integration model in Europe but also they were enthusiastically defended by Western European countries in international fora in the Cold War atmosphere and they were even acknowledged by the end product of the Conference on Security and Cooperation in Europe, 1975 Helsinki Final Act, which can be seen as a success for western Europe in *détente* period.

rule of law, principles which are common to the Member States." This article was referred in article 49 as a requirement to apply for membership: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union" Thus, Copenhagen political criteria became a Treaty provision and the Treaty of Rome's provision with regard to membership condition, which was being simply a European country, was altered in a fundamental way (Article 237). It was also referred in Article 7, stating that "in the case of the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)" it is possible "to suspend certain of the rights deriving from the application of this Treaty to the Member State in question." According to the Article, while it was possible to suspend even the voting rights in the Council, the obligations of the Member State concerned should continue to be binding on that State.[12] Thus, a sanction mechanism was set for the first time that had the power of law. This mechanism was in particular relevance with prospective eastern enlargement (de Witte, and Toggenburg, 2004, p.59).

What is more, Article 46-(d) referred to Article 6(2) while describing the competences of the CJEU and required that the actions of the institutions were in compliance with this provision. Naturally, the actions had to fall within the scope of the Court's jurisdiction.

Another important amendment was enhancing the protection system against discrimination, which can be deployed by the Council's action[13], through extension of grounds of discrimination to cover "religion or belief, disability, age or sexual orientation" in addition to "sex and racial or ethnic origin" with Article 13. In this manner of regulation, the equality approach in EU law that limited its concerns with gender and nationality was altered.

After Amsterdam, in addition to the Council's directive that established a general framework for equal treatment in employment and occupation, the grounds of

[12] Correspondingly, the sanction mechanism was also laid out in Article 309 of the Treaty Establishing the European Community.

[13] "The Council should act unanimously on a proposal from the Commission and after consulting the European Parliament." (Article 13).

discrimination were extended to encompass religion or belief, disability, age or sexual orientation in 2000 (2000/78/EC, 27 November 2000). The same year, the Council issued another directive for fighting against discrimination on the grounds of racial or ethnic origin (2000/43/EC, 29 June 2000). Moreover, together with European Parliament, the Council not only continued to issue directives on gender equality in the employment related areas (2002/73/EC, 23 September 2002 amending Council Directive 76/207/EEC; 2006/54/EC, 5 July 2006) but also in the area of access to and supply of goods and services (2004/113/EC, 13 December 2004).

Following the insertion of Union citizenship and certain rights peculiar to it with Maastricht, Amsterdam added a new right for citizens of the Union, namely the right of access to documents in Article 255.

One of the most significant novelties in the Amsterdam Treaty in terms of human rights issues was extending the jurisdiction of the CJEU by transferring the "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons" title (Amsterdam Treaty, Title IV (ex Title IlIa)) from the third pillar (Justice and Home Affairs pillar) to the first pillar (European Communities) with Article 68. This provision was important not only for Union citizens but also for nationals of third countries as their rights were protected against measures on immigration, asylum, refugees and displaced persons (Article 63).

Lastly, Article 11 kept the former Article J(1)-2 while Article177-2 reserved the former 130u.

In 1997, before the ratification of the Treaty, the Report on the Treaty of Amsterdam (Mendez de Vigo ve Tsatsos Report) (European Parliament, 1997) once again stressed human rights as one of the values of the Union and called for drawing up a charter of fundamental rights for the Union. It further called for protection of Union citizens' rights in the cases of Amsterdam Treaty's sanction mechanism in Article 7, which envisaged suspension of a Member State's rights when serious and persistent breach of human rights occurred, was to be used.

It is seen that the momentum that started with Maastricht in terms of human rights protection continued in the second half of the 1990s and the provisions of Amsterdam strengthened the framework with regard to human rights in the Union.

### 2.3.3. The Treaty of Nice

Shortly after Amsterdam Treaty entered into force in 1999, the Treaty of Nice was signed in 2001 and it started to take effect in 2003.

The Treaty of Nice brought about several institutional changes adding to previous important provisions regarding the functioning of and relationship between the main EU institutions, which aimed at legitimacy and efficiency in the face of the new enlargement wave (European Union, 21 March 2018). Nevertheless, its scope was not far reaching when it was compared with Amsterdam, and especially with Maastricht. Yet, its sole provision on human rights was one of the most notable features of the Treaty. The story of inserting this provision into the Treaty seems incidental in some ways. However, it can also be argued that it reflected a sensitivity with regard to a popular issue of the reform decade, which was human rights, as well as a sense obligation for the pressing needs of the forthcoming enlargement.

The incident that commenced the process was related to a Member State's arguably domestic politics. "Haider affair" is famous enough in the EU's recent human rights history. The crisis broke out following the extreme right party FPÖ's (Freedom Party) inclusion in Austria's new coalition government in 2000. The leader of FPÖ, Jörg Haider, provoked a widespread reaction due to his pro-Nazi and xenophobic statements. Whatever the political and economic motives behind the bilateral diplomatic sanctions against Austria by Member States, one of the results of the process was amending Article 7 to cover the situations where there is "a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)" "in addition to the existence of a serious and persistent breach".

Despite the Nice Treaty's limited scope, works on reforming the EU were not limited with Nice. Both preceding and following developments helped building a new structure: European Councils in Cologne and Tampere in 1999, Nice in 2000 and Laeken in 2001 dealt with creating a Charter on fundamental rights, setting up an agency for human rights and constitutionalizing the treaties. In 2004, the Draft Constitutional Treaty was signed in Rome. After its rejection by referenda held in France and Netherlands in 2005, the efforts for reform were channeled to the works

on the Treaty of Lisbon. Williams argued in 2004 that the Treaty of Amsterdam, the Charter of Fundamental Rights and the Draft Constitutional Treaty should not be seen as "final constitutional word" and they are all additions to the human rights narrative of the EU (p.156-7). Indeed, despite the failure to create a constitutional treaty, the Treaty of Lisbon transcended the limits of all the previous treaty provisions, although the Treaty of Lisbon can hardly be seen as "final constitutional word" too, as integration is a process that is subjected to constant change according to politics of the day.

### 2.4. The Treaty of Lisbon

The failure of Draft Constitutional Treaty compensated by the Treaty of Lisbon. Thus, the reform agenda, which had been set nearly one and a half decade ago was not abandoned. The Treaty of Lisbon was signed in 2007 and entered into force in 2009.

The Treaty dismantled the three-pillar structure that was created by Maastricht and envisaged that "The Union shall have legal personality" (Article 47). Thus, legal personality of the first pillar's EC was extended to cover other pillars under one roof – the roof of the EU.

The European Council was listed among the institutions of the Union (Article 13) while a President of the Council and a High Representative of the Union for Foreign Affairs were envisaged as new positions (Article 15). The High Representative of the Union for Foreign Affairs and Security Policy is also one of the Commission's Vice-Presidents (Article 17/4). One of the eight EU Special Representatives that support the work of the High Representative of the Union for Foreign Affairs and Security Policy is the EU Special Representative for Human Rights.[14]

In addition to expressions in the Preamble, which confirms Member States' attachment to human rights, Article 2 stated that "the Union is founded on the values

[14] For EU Special Representatives see: https://eeas.europa.eu/headquarters/headquarters-homepage/3606/eu-special-representatives_en

of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Article 49 referred Article 2 for membership, thus, particularly respect for the rights of persons belonging to minorities became one of the membership criteria. Article 49 states: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." The main difference between ex Article 49 brought by Amsterdam and new Article 49 is, though, that Lisbon envisaged that values in Article 2 will not only be protected but also promoted. Article 2 is also referred in Article 7 by preserving the suspension mechanism, which was introduced by Amsterdam and developed by Nice, for a clear risk of a serious breach as well as a serious and persistent breach of the values stated in Article 2.

However, one of the most prominent provisions of the Treaty is presumably Article 6 as it finally put an end to two long standing issues, namely a binding charter of rights and the EU's accession to the ECHR. The binding legal status of the Charter of Fundamental Rights of the European Union (which was proclaimed in Nice on 7 December 2000) and the accession of the EU to the ECHR were envisaged in first and second paragraphs of Article 6 respectively while third paragraph of the Article reiterated that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are among general principles of EU law.

Other important developments that were realized by Lisbon are regarding citizenship rights -set in Article 9 *et seq*.-, which constantly employed for the EU's search for legitimacy especially after Maastricht Treaty. Most innovatively, Article 11 introduced citizen's initiative. According to this provision, one million citizens can invite the European Commission "to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties", a concrete step to ensure the rights of citizens to participate in the democratic life of the EU and to take decisions "as openly and as closely as possible to the citizen" as stated in Article 10(3). Therefore, citizens of the EU acquired a new right, added to previous ones, such as applying to the Ombudsman and the Parliament.

It is also worth noting that he CJEU[15] have jurisdiction in the field of police and judicial cooperation in criminal matters.[16]

With regard to the Union's external relations, "the Union shall uphold and promote its values and interests and […] contribute to […] the protection of human rights, in particular the rights of the child" according to Article 3(5). In Article 21, consolidating and supporting human rights stated as one of the guiding principles of foreign policy and action. The relationship with neighbouring countries, on the other hand, is paid a special attention in Article 8(1) by stating that

> The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

The article referred the values of the Union, which includes human rights, for these relationships.

As noted above, the most remarkable changes brought about by Lisbon are the inclusion of the Charter of Fundamental Rights to the Treaty text and the provision of the EU's accession to ECHR as they have a direct and meaningful influence on the EU's legal system concerning human rights. Moreover, they are good examples for analyzing how the narrative on human rights of the EU functions in law and policy making and how the EU's approach to human rights evolved throughout the years. For these reasons, it seems appropriate to pay special attention to these novelties.

### 2.4.1. Accession to the European Convention on Human Rights

As stated earlier in this chapter, the accession to ECHR by the EU was raised by both the Resolution of the Parliament and the Memorandum of Commission in

[15] The European Court of Justice become the Court of Justice of the European Union and its organizational structure and competences are regulated in Article 251 *et seq.* of the TFEU.

[16] However, Article 276 of the TFEU states that "In exercising its powers regarding the provisions on police cooperation and judicial cooperation in criminal matters relating to the area of freedom, security and justice the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

1979. In fact, the roots of accession as an idea can be found even in the EPC drafting process (de Burca, 2011, p.8).[17] This vision could attain a legal basis only with Lisbon Treaty. However, the issue is yet to be settled as the process of accession is still awaiting to be completed as of the end of 2020.

When it was first requested from the CJEU to deliver an opinion on the issue, the Court stated that the accession would require a substantial change in the present Community system and thus, the Union (then the Community) had no competence to accede to the ECHR (Opinion 2/94, 1996 ECR), showing its reluctance to protect human rights unconditionally and the priority had always been given to Community legal order in the face of human rights. Nevertheless, the Court did not abstain from pointing out that "fundamental rights form an integral part of the general principles of law" and "respect for human rights is a condition of the lawfulness of Community acts."

The issue became more pressing in the reform years, and it was finally envisaged that the EU shall accede to the ECHR by Article 6(2) of the TEU.[18] However, this provision does not automatically take effect and it requires further efforts by both the EU and the CoE. In addition to the EU Treaties, the ECHR required to create a legal basis for the EU's accession. Thus, Article 17 of the Protocol No.14 to the ECHR, signed in 2004 and entered into force in 2010, changed Article 59 of the ECHR to enable the EU to accede the ECHR.[19] Following these changes, a draft agreement was proposed to the CJEU and the Court issued another opinion on accession (Opinion 2/13, 2014). According to the Opinion of the Court, the agreement was not compatible with Treaty provisions.

The road towards accession proved that it has been a bumpy one. When specific legal and procedural challenges of accession, as also identified by Douglas-Scott (2011, p. 660-9), are taken into consideration it is more curious to bind the EU with

[17] "The work of the Comité d'études pour la constitution européenne (CECE) on human rights" (de Burca, 2011, p.8).

[18] Article 218 of the TFEU and Protocol (No. 8) of the TEU also contain provisions for the accession.

[19] Article 59(2) of the ECHR is as follows: "The European Union may accede to this Convention."

this new system. Does it serve to a coherence or complicate the system (Douglass-Scott, 2011, p.658-69)? According to Greer and Williams, the accession will negatively affect both systems as it will, for instance, increase the case-load of the already overwhelmed ECtHR while complicate the EU's Charter-based system that might create opportunities for a more comprehensive understanding of rights (Greer, and Williams, 2009, p.480).[20] Given such challenges, efforts for accession and concerns with respect to the alternative of not acceding can be understood as part of a broader political agenda that relates with the issues such as legitimacy and integration process, rather than seeing accession as the only way to protect human rights due to their value *per se*. It can be asserted that the EU's external accountability with respect to human rights is related with accession since the EU is "the only public authority in CoE territory not to be subject to external accountability" (Douglass-Scott, 2011, p.669).

As mentioned above, since the *Nold* case in 1974, the CJEU started to refer to the ECHR. In the past, recognizing the ECHR's case-law on human rights was stemmed from a legitimacy deficit, bringing along an autonomy cost for the CJEU (Schimmelfennig, 2006, p.1257). On the other hand, in addition to the legitimacy related symbolic value of accession, it is also true that it has the real potential to create a stronger protection for rights of individuals by providing a benchmark to evaluate the EU's human rights protection (Odermatt, 2014, p.81-82). From international law perspective, the EU is not under obligation to abide by the ECHR without the accession, which will require the EU to comply with the ECHR jurisprudence (p.117-18). Thus, the accession will provide individuals whose rights might be violated by the EU an external legal remedy under international law (Douglass-Scott, 2011, p.660). The accession can also create a coherence between the EU's and its member states' responsibilities in terms of human rights as well as prevent conflicts between the rulings of the CJEU and ECtHR (Douglass-Scott, 2011, p.659).

[20] Therefore, they suggest a new constitutional model, which requires the EU to renounce its powers to the CoE in the area of human rights, should be developed. (Greer, and Williams, 2009, p.481).

From a historical point of view, however, despite its positive results, one of the most prominent achievements of Lisbon illustrates another contingency in the EU's human rights journey, as the roots of the idea of the EU accession to the ECHR are mostly in the EU institutions' legitimacy search. It seems that realization of human rights is not the end that should be achieved for its own sake but rather they are one of the means of mitigating concerns that surround European integration. In the light of de Burca's argument (2011), contrasting the draft EPC's ambitious human rights agenda with the present one's development history demonstrates the EU's approach that favours to protect and promote human rights only as much as it is required at some point of integration process, of which economic rationales constitute an important part.

### 2.4.2. New Legal Status of the Charter of Fundamental Rights

As the EU had started to be more concerned with political, cultural and social issues in addition to economic ones, a demand for a text to protect the fundamental rights of its citizens emerged (Kruger, 2004 cited in Defeis, 2009, p.415). Also, the fact that the ECHR did not contain economic and social rights caused a discontent that leaded to inclusion of them to a new document along with the need to oblige the EU to conform with such a document (Defeis, 2009, p.416). Another argument, which seems stronger, for the Charter's binding status had been the logic to create obligations for the EU institutions (Defeis, 2012, p.1223). Since the increasing visibility of the Union in the eyes of Europeans caused an apparent legitimacy problem, European identity and citizenship have been employed by EU institutions for a long time in their search of legitimacy (Schönlau, 2005, p.7). The importance of human rights for construction of a common identity and their relevance to citizenship is evident. The Charter -and human rights protection in the EU- functions as a tool to promote European identity, in addition to its role of limiting the EU polity through human rights provisions (Maduro, 2003, p.269). Both of these functions are, at some level, related with the logic of legitimating European integration since integration is a constant process rather than a completed project. Moreover, as democratic legitimacy of the EU is not very strong, the perception of Europeans regarding the EU as an effective polity, with judiciable fundamental rights, becomes more important (Engel, 2001, p.160).

Unlike the failed Draft Constitutional Treaty, Lisbon did not incorporate the Charter text into the Treaty. Instead, Lisbon Treaty bestowed the same legal value as the Treaties upon the Charter. Nonetheless, the CJEU started to refer the Charter before its binding legal status granted by Lisbon Treaty (Dougan, 2008, p.664). As early as 2002, the Court of First Instance included the Charter in its case-law (See for instance, *Jégo-Quéré*, Case T-177/01, 2002, ECR II-2365). However, as the first case that referred the Charter by the CJEU was in 2006 (*Parliament v Council*, Case C-540/03, 2006, I-5769, at para 38) it was not fully realized in its first couple of years (Brand, 2003, p.396).

It should be stated that the Charter is applicable for the actions of the EU and the Member States as far as they apply the EU law (Article 51/1). Also, Article 51 (2) of the Charter states that it does not alter the Treaties or the powers and tasks of the Union although the it has some novel provisions. Therefore, this provision seems problematic since the Charter envisages different range of rights that have not been included in the instruments recognized by Treaties. It is also stated in the Charter that the rights, which correspond to rights guaranteed in the ECHR, shall have the same meaning and scope (Article 52 of the Charter). As the Treaty of Lisbon envisage the EU's accession to the ECHR and the Preamble of the Charter reaffirms the rights as they result from the ECHR, it follows from this that the Charter must be read in the light of the ECHR and the case-law of the ECtHR (Defeis, 2009, p.419-20). Still, the fact holds that how the Charter is construed by the CJEU is not clear (Defeis, 2009, p.418). This can be read as one of the examples of the "symbolic attachment" to human rights in the EU by not defining the rights and thus, claiming the EU's "authenticity through the language of rights" (Williams, 2004, 149-150). It is important to note that vagueness of the meaning of the protected rights enable the EU to define them depending on the context that they are raised, as in the case of their dissimilar employment in and outside the EU (Williams, 2004, 159-160). Abovementioned arguments with regard to the Charter's background support this view.

By that token, it should be noted that there has been arguments that stresses the inadequate level of application of the Charter by the CJEU (Groussot and Petursson, 2015), although it was argued that the new status of the Charter could lead an impetus

for human rights protection in the EU and the CJEU would continue to be the leading institution of integration grounding on rights and transcending the EU's the economic goals (Morano- Foadi and Andreadakis, 2011, p.610).

It seems that the most prominent amendments made by the Lisbon Treaty in the area of human rights are the new binding legal status of the Charter and the accession of the EU to ECHR. Nevertheless, in the light of the foregoing, "what is the added value of the new system?" and is there "a *surfeit* of human rights protection within the European legal space?" should be the questions we search for answers (Douglas-Scott, 2011, p.647). This is necessary to understand all the meanings of these novelties. Whether they are realised because of a genuine quest to protect human rights or the intention to solve the problems of integration process is more dominant should be paid due attention.

When the criticism that fundamental rights has been an instrument for the EU to fortify "the autonomy, supremacy and legitimacy of EU law, rather than for their own", the Lisbon Treaty's amendments with regard to fundamental rights protection should be evaluated in the light of the criticism in question, which maintains that rights have been manipulating for other intentions, along with the criticism that they are incoherent in the EU law and policy (Douglass-Scott, 2011, p.649-50). Even though human rights protection attained a more established framework with the Charter's new legal status, "their uncertain conceptual underpinnings and their contested scope" make it difficult to contend that legal amendments provided human rights a determinacy and consistency in the EU system (Augenstein, 2013, p.1919). The argument that the Charter, from its first adaptation, failed "to clarify the jurisdictional reach of EU fundamental rights" (p.1919) seems rather strong.

As it has been seen, the EU human rights system, in its most advanced version created by Lisbon Treaty, is a subject of constant discussion. One of the questions that surrounds the EU's ulterior motives regarding its human rights approach within the EU polity relates its economic integration logic and its negative effect on human rights protection by determining the conditions of that protection, which I will try to cover in Chapter 4. However, a ground will be set in the next chapter to analyse the EU's human rights approach in connection with its economic integration by drawing some

conclusions with regard to the relationship between economic integration and human rights with the help of Mercosur case. Distinctions and similarities between the EU and Mercosur cases will elucidate the evolution of human rights approach of the EU.

# CHAPTER 3

# WALKING A TIGHTROPE: SEEING HUMAN RIGHTS AS A COUNTERWEIGHT TO ECONOMIC INTEGRATION

In the age of globalisation, like many other concepts and matters, human rights and freedoms locates in a context whose demarcation lines are not determined by their own scope, but global trends. Liberal trade is one of the most outstanding aspects of our global world as it permeates almost every realms of our lives due to a constant global exchange of information as well as goods and services. For this reason, giving due consideration to globalisation and trade liberalisation at both international and regional levels can help to examine the EU case and the relevance of economic integration to the development of its human rights approach. Albeit the special conditions of European integration, some similarities can be observed with other projects when it comes to economic integration. Especially after the changing international political and economic environment of the 1990s, regional and global developments has become more pertinent for each other. In this chapter, it is aimed to understand the conditions that has shaped the EU path with the contributions of the perspectives that take into account this state of affairs and that are centred on phenomena other than European integration.

## 3.1. Comparative Regionalism Perspective

The EU is the most significant example of regional integration. However, there are other prominent examples that have achieved a considerable level of political, economic, social and cultural integration at regional level. Looking into these cases would be useful to detect some common patterns of regional integration projects as well as divergences between them. Therefore, to have an understanding with regard to

the effect of the EU's economic integration logic on its human rights approach, a comparative regionalism perspective steers the route of this chapter. Accordingly, this chapter aims to scrutinize the regional economic integration and human rights link by drawing insights from the literature on Mercosur case, in addition to exploring this link in general. The choice of comparative regionalism perspective relates to the idea that the EU should be studied in a wider context that can reveal the factors affecting its human rights approach and the developments that are similar and different in other examples. As this wider context is dealt in regionalism literature, I will touch upon this literature as far as this review requires. However, before starting to review the literature on Mercosur's human rights approach and development, the logic of this chapter should be accounted for.

In the following, the logic of the literature review and the methodological value of comparative regionalism will be covered as well as the reasoning of case selection and a conceptual framework for regionalism.

### 3.1.1. Comparative Regionalism as a Methodology and the Logic of the Literature Review

As stated by Söderbaum, case studies are important sources of context-based and comprehensive information (Söderbaum, 2008, p17). In spite of this, a case study is not suffice to generalise the findings of one research (Axline, 1994, in Söderbaum, 2008, p.17). Moreover, single case studies do not have the tools to eliminate the excessive focus on ethnic and cultural boundaries in contrary to comparative studies (p.17). Departing from this perspective, Söderbaum suggests that Europe should be "integrated within a larger and more general discourse of comparative regionalism, built around general concepts and theories, but that remains culturally sensitive" (p.18). It is also defended by other scholars that the EU should be studied by drawing insights from comparative regionalism perspective (See, *inter alia*, Warleigh-Lack, 2015) and it is a comparable case with other regional organisations rather than having an existence on its own right (Fawcett and Gandois 2010). Warleigh-Lack and van Lagenhove, drawing from Murray and Kluckhohn (1953), put forward that "the EU is at once a regional integration scheme that in some aspects is like all others, in some,

like several others, and in others has no real homologue" (2010, p.553). Therefore, studying on other regions can help us to advance our understanding on the EU (Söderbaum, 2016, p.17). In this sense, a comparative regionalism perspective might be helpful for understanding the influence of the EU's economic integration on its human rights approach.

It might be more useful to compare regions or regional organisations by focusing on certain aspects of regionalisation, rather than a general comparison, as it is noted by Warleigh-Lack and van Lagenhove, (2010, p.551). Similarly, Börzel argues in the context of governance approach that "the governance turn greatly facilitates cross-regional comparisons" as it does not require to compare "certain types of actors, institutions or modes of coordination" and it takes into consideration informal networks and non-state actors as well as formal and state-led regional formations (Börzel, 2016, p.55). Following this logic, for the thesis deals with the development of the EU's human rights approach by focusing its feature of being a regional integration scheme with an economic aspect, this chapter targets human rights dimension of Mercosur as a regional integration scheme that has an important economic aspect like the EU while mentioning general aspects of its integration as far as they are considered relevant to the aims of this research. However, at the outset, I should state that my aim is not to make a fully-fledged comparison. Rather, I intend to derive some insights that might be helpful to explore the link between economic integration and human rights for understanding the EU path in this regard.

This comparative approach to regions not only constitutes a conceptual framework for this thesis, but also indicates a methodology. Warleigh-Lack and van Lagenhove state "[s]tudying regions and regional integration from a comparative perspective […] refers to a research methodology that aims to make comparisons across different countries or cultures" (Warleigh-Lack and van Lagenhove, 2010, p.548).

In line with these arguments, I review the literature on human rights dimension of Mercosur and corollary to this, Mercosur regionalism, mainly because of the idea that to study the EU in a greater context -by looking at another regional integration

project- might be helpful to avoid being blinded by the excessive focus on the EU as if it exists in a vacuum.

In the following section, I will set out the reasons of selecting Mercosur case to draw insights for the evolution of the EU's human rights approach.

### 3.1.2. Preliminary Notes on Case Selection

After the logic of the adoption of comparative regionalism perspective and the literature review on human rights approach of Mercosur and Mercosur regionalism is accounted for, the reasons of selecting Mercosur as a comparative case for the EU in terms of the link of human rights and economic integration should be explained.

As "it is important to achieve a broader analytical and comparative focus, pulling together evidence from different regions and practices" while "thinking comparatively and theoretically about regionalism" (Fawcett-2004, p.435) I aspire to catch a wider view that can be helpful in explaining the EU path by benefitting from Mercosur example. This is because of the fact that Mercosur is a regional integration project with a strong economic dimension that also deals with human rights issues. This common feature with the EU is the reason for reviewing the related literature on Mercosur since this brings along the benefit of drawing some insights for my research on the EU. Furthermore, interregional relations (*See* "3.3.4.1. Interregional Relations Perspective" below) between these two organisations - with similar competences- can be seen as a reference point to consider them as comparable cases (de Lombaerde *et al.* 2010, p.747).

Because Mercosur example is used to account for the advance of human rights in the EU with a view to understand the relevance of economic integration to this development, the focus of the literature review will be on Mercosur's human rights path while also giving a consideration to its integration process.

With respect to the number of cases, they are limited as this thesis intends to focus on certain aspects of regionalism in the EU in a qualitative and thorough manner (Della Porta, 2008, p.198 *et seq.*).

A more detailed reasoning regarding the selection of Mercosur as an enlightening case for the EU in terms of human rights protection and economic

integration will be addressed in the proceeding sections. However, it should be noted that the comparability of the EU with Mercosur is based on abovementioned governance approach in regionalism literature (Börzel, 2016) and not from a legal point of view since legal orders of these two organisations are too different to compare them in a meaningful manner, as it will be discussed in the related parts of the following sections.

Accordingly, after I clarify my conceptual framework with regard to regional integration, I then move to the literature on Mercosur integration focusing on its human rights related aspects. Before doing the latter, the link between economic integration and human rights will also be handled briefly. It should be noted that the literature is reviewed in a non-exhaustive manner, as my aim is to draw some insightful perspectives with respect to development of human rights in regional projects that have a strong economic flavour.

### 3.1.3. Conceptual Framework for Comparative Regionalism

It is widely accepted in regionalism literature that the definitions of region and its associated concepts, i.e. regionalism, regionalisation and so on, do not have the same content in every study in the field (See *inter alia*, Mansfield and Solingen, 2010; Fawcett, 2004; Behr and Jokela, 2011; Börzel, *et al.*, 2012). Sbragia points out the plurality of sources, such as political science, economy and international relations that feed regionalism literature to explain in part the definitional pluralism in the field (2008, p.29-30). Closa, on the other hand, indicates to the constructivist approaches in the literature, which turn away from the territory-based meanings of regions, as a contributor to ambiguities (2015, p.4). However, "a degree of definitional flexibility" that allows for a wider perspective containing various types of regions and transcending geographical and state-centred views might be more insightful, as stated by Fawcett (2004, p.431-432). In this regard, Fawcett also states, "a certain amount of both definitional and theoretical flexibility is required" because of their diversity in several aspects (2004, p.434).

Against this backdrop, conceptual approaches in the literature can be explored starting from the main concept "region". According to Börzel and Risse, regions

indicate "social constructions that make references to territorial location and to geographical or normative contiguity" that "usually include more than two countries" at a level "between the national and the global" (Börzel and Risse, 2016, p.7). This is a fairly broad definition that includes geographic as well as social and political elements. In addition to this definition, regions are also classified and defined as micro and macro regions. Söderbaum states:

> Historically the concept of region has been evolved primarily as a space between the national and the local within a particular state. These types of regions are here referred to as micro-regions. The concept of region can also refer to macro-regions (so-called world regions), which are larger territorial (as distinct from non-territorial) units or sub-systems, between the state level and the global system level (Söderbaum, 2008, p.2).

Hence, the term "region" indicates macro region in common usage. Another definition of region is as follows: "regions are socially constructed, spatial ideas, which follow concepts of community and society" (Börzel *et al.*, 2012, p.4). In accordance with this, Börzel *et al.* state that economic considerations are not enough to explain regionalism (2012). In addition, they see regionalism as a state-driven enterprise with legal and formal bounds (2012).

Because of the pluralism with regard to the concept "region", its associated concepts have multiple definitions, too. In fact, differentiated concepts that are derived from "region" also reflect the fragmentation regarding its definition.

In close relation with their definition of "region" Börzel and Risse define regionalism as a process that is driven primarily by states with "*formal regional institutions and organizations among at least three states*" while defining regionalisation as an informal "*processes of increasing economic, political, social, or cultural interactions among geographically or culturally contiguous states and societies*" (2016, p.7-8).

On the other hand, Söderbaum defines "regionalism" as "policy and project, whereby state and non-state actors cooperate and coordinate strategy within a particular region or as a type of world order" which "is usually associated with a formal programme, and often leads to institution building" (Söderbaum, 2008, p.2).

Therefore, he stresses, too, the formal nature of regionalism whilst he also recognises the role of actors other than states.

Acharya, as one of the most prominent scholars of regionalism literature that has been developed in the last three decades, highlights the role of non-state actors in a complex communication web in which all relevant actors interact each other (2012). In connection with this point, he states that the dominance of formal ways of regionalism are challenged by less formal processes of regionalisation (Acharya, 2012). Furthermore, constructivist approach to regions, which is one of the most fundamental features of his studies, requires to define regions as "socially constructed" entities, rather than "a geographic given" (Acharya, 2012, p12). The construction of these entities in the form of institutionalised structures are influenced by both "domestic and transnational factors" (p.12).

According to Söderbaum, too, "all regions are socially constructed and hence politically contested"(2013, p.17). That is to say, it is important that "how political actors perceive and interpret the idea of a region and notions of "regionness" (Söderbaum, 2013, p.17).[21] From this perspective, there are no "natural" regions; all regions are, at least potentially, heterogeneous with unclear territorial margins" (Söderbaum, 2013, p.17). From a similar point of view, Fawcett remarks, "regions and regionalism are what states and non-state actors make of them" (2004, p. 434).

However, despite the pluralism with regard to concepts and definitions, it is propounded that regional projects have some fundamental components: in addition to a commonality in terms of geography, a commonality with regard to regional perception is also required (Tavares, 2004 cited in Behr and Jokela, 2011, p.6). Moreover, there should be profound political and economic interactions that continue on a regular basis as well as "agency and outside recognition" (p.6).

Another definition of regionalism is based on soft-hard regionalism distinction of Fawcett (2004). Accordingly, in the pursuit of common goals, soft regionalism means promotion of "a sense of regional awareness or community […] through consolidating regional groups and networks" while hard regionalism represents "pan-

[21] For the term "regionnes", see below.

or subregional groups formalized by interstate arrangements and organizations" (Fawcett, 2004, p. 433). While acknowledging the importance of "soft regionalism", she emphasizes the substantial effects of "hard regionalism" on possible results" (p. 433). It follows from this, soft-hard regionalism distinction correspond to formal-informal regionalism distinction, which is also parallel to regionalism-regionalisation distinction.

Nonetheless, regionalism-regionalisation distinction is not a clear-cut one. As Breslin maintains, regionalisation can occur without formal regional institutions, albeit governments can take part in this process as promoters (2010, p.713-14) Likewise, Mansfield and Solingen point out,

> regionalization driven by private actors— economic and otherwise—is often reinforced by states. On the other hand, bottom-up efforts (domestic and transnational) may lead to regionalism as the intended or unintended product of pressures on states (2010, p.147).

In addition, Fawcett contends that regionalisation

> may give rise to the formation or shaping of regions, which may in turn give rise to the emergence of regional groups, actors and organizations. It may thus both precede and flow from regionalism (2004, p. 433).

In fact, Breslin, Higgott and Rosamond who see regionalism and its sibling regionalisation as different regional integration models, state that there "is the 'chicken and egg' question of whether formal precedes informal integration or *vice versa*" (2002, p.19). However, it is argued that formal institutionalisation is not a precondition for an effective regional cooperation (Jetschke *et al*., 2015, p.22). In this context, it is also maintained that formal–informal regionalism distinction could be a false dichotomy (p.21).

Although regionalism and regionalisation could be used to substitute each other (Fawcett and Gandois, 2010, p.619), especially in earlier literature (Sbragia 2008, p.35-6), and a permeable line lies between the two (Mansfield and Solingen, 2010, p.147), abovementioned definitions suggest a formal-informal dichotomy existed in several conceptual approaches and there is an inclination to call informal regionalism as "regionalisation".

Another distinction that can be made between regionalism and regionalisation concerns project-process distinction. By referring the works of Hurrell (1995) and

Gamble and Payne (1996), Breslin distinguishes between regionalism and regionalisation as *form* and as *process* respectively (2010, p.713).

Similarly, Fawcett and Gandois see regionalisation as "a process that encompasses an increase in region-based interaction and activity" whilst seeing regionalism, as "a political project" (Fawcett and Gandois, 2010, p.619). They state:

> The key here is the differentiation between the bottom-up approach of regionalisation characterised by undirected economic and social interactions between non-state actors, whether individual, companies or nongovernmental organisations (the focus of much of the new regionalism literature), and the top-down approach of regionalism that occurs at a political decision-making level in different areas of cooperation, be it economic cooperation, but also in the areas of peace and security, among others. (p.619).

In her earlier study, Fawcett also notes, "[i]f regionalism is a policy or project, regionalization is both project and process" (2004, p. 433). In a similar way, Söderbaum sees regionalisation as a process in different forms like integration or cooperation (Söderbaum, 2008, p.3).

Aside from region, regionalism and regionalisation, there have been other associated concepts advanced in the literature. One prominent example is the concept of "regionness" developed by Hettne and Söderbaum (2000). According to Hettne and Söderbaum, too, formal regionalism is different from regionalisation process and the latter "implies increasing 'regionness'" (2000, p.458). The term "regionness" indicates a means to have an understanding of different regionalisation processes in the world p.458). From this perspective, regions are taken as entities under constant construction, rather than as presumed entities or finalised projects or simply "aggregation[s] of 'states'", and thus in a perpetual regionalisation process (p.462). Regions can be at different levels of "regionness", the loosest of which is called "regional space" while the most intensive one is called "region-state" (Hettne and Söderbaum, 2000). "Regional space" refers to a certain terrain rather than a formed entity, and therefore to an embryonic phase in the regionalisation process (2000). On the other hand, "region-state" can be seen as a mature polity, though, it should be noted that it by no means indicates a sovereign and uniform polity in the sense of Westphalian state (2000). As regionalisation process intensifies, "regional complex", "regional society" and "regional community" levels follow "regional space" towards "region-state" level

(2000). In “regional complex”, the outstanding feature is dominance of nation state in an anarchic international environment while “regional society” is a more cooperative, interdependent and formalised state of regionalisation process with multidimensional and multilevel interactions whereas in “regional community”, “formal” and “real” regions fortifies each other (2000).

Warleigh-Lack, after stating that “the “regionness” spectrum of Hettne and Söderbaum has become acknowledged as the conventional typology in comparative regionalism studies” (Warleigh-Lack-2015, p.875), classifies the EU as a “region-state”, the Association of Southeast Asian Nations (ASEAN) as a “regional community”, the North American Free Trade Agreement (NAFTA) as a “regional society” and the Asia-Pacific Economic Cooperation (APEC) as a “regional complex” while omitting “ “’regional space’ category, as this kind of region involves an insufficient degree of co-operation” (Warleigh-Lack-2015, p.875-6).

In addition to this, Behr and Jokela identify five typologies of regionalism based on their differences in scope, depth, functions, drivers and institutions (Behr and Jokela, 2011). In terms of scope, regions can be classified as micro regions, cross-border regions, sub-regions and macro regions (Behr and Jokela, 2011). As for depth, Behr and Jokela refer to Hettne and Söderbaum’s “regionness” levels while recognizing the constraints of the approach with respect to comparative analyses (2011). In terms of function of regional integration, it can be economic and political, but it can be related to regional identity, as well (2011). Furthermore, an integration project can also be driven by “rationalist-economic”, “legal-political”, “power-balancing” and “socio-cultural” logics (2011). Institutions of regional integration projects, on the other hand, are intergovernmental councils, administrative and executive bodies and dispute settlement mechanisms along with other decision-making mechanisms (2011).

Further distinction is made between “regional cooperation” and “regional integration” concepts as different ways of regionalism. Söderbaum defines them as follows:

> Regional cooperation can be defined as an open-ended process, whereby individual states (or possibly other actors) within a given geographical area act together for

> mutual benefit, and in order to solve common tasks, in certain fields, such as infrastructure, water and energy, notwithstanding conflicting interests in other fields of activity. Regional integration refers to a deeper process, whereby the previously autonomous units are merged into a whole (2008, p.3).

Regional integration, according to Söderbaum, can be differentiated in terms of its functions, too (p.3). Accordingly, regional integration, which is formed at a transnational level, can be political, economic and social (p.3). With respect to functional distinction, Dosenrode argues that regional integration can be economic or political, however, "the highest 'stage' of both economic and political integration includes the other" (2016, p.4).

As regards the concept of regional integration, Warleigh-Lack and Rosamond employ it in an inclusive manner for various regionalization projects (2010, p.993). Corollary to this, they argue that integration *process* and the institutional *form* of a certain integration project should be differentiated (2010, p.1000).

Dosenrode also distinguishes between cooperation and integration by stating that cooperation is intergovernmental while integration is supranational (2016). Moreover, capturing the diverse essence of regionalism, he expresses that "all regional integration is regionalism(s), but not all regionalism(s) are regional integration" (2016, p.6). He also maintains that there is no shared perspective on the definition of regional integration in the literature and one reason to this is one of the dilemmas with regard to regional integration, which is its nature that can be seen as both process and state (2016, p.3-4). Similar to Dosenrode, Börzel and Risse see regional integration, "as the pooling and delegating of authority in regional institutions" (2019, p.1232).

Börzel *et al.* also distinguish between regional cooperation and regional organisation by drawing attention to some features of regional organisations, such as accommodating three or more states located in a close geography and having a multi-purpose nature (2012).

Acharya, too, states that integration and cooperation differentiate in important ways (2012, p.12). While integration "by definition implies loss of sovereignty" and the EU-oriented, regionalism in the form of different cooperation models has a richer conceptual and historical framework (2012, p.12).

Following Börzel and Risse's definition, this thesis understands regionalism as "*formal regional institutions and organizations among at least three states*" (2016, p.7-8). "Regionalism" is also seen as a project, "as associated with a formal programme, and often leads to institution building", but it is also seen, for the purpose of this study, as a form of integration, not cooperation (Söderbaum, 2008, p.3). As regards functions, both economic and political integration are meant while using the generic concept regional integration (Söderbaum, 2008). Accordingly, regional integration concept will be used as a sub-version of formal regionalism. Lastly, it should be noted that while grounding on formal regionalism, this study do not decline the views that sees regions as "socially constructed" entities (See, Acharya, 2012; Söderbaum, 2013, p.17; Fawcett, 2004, p. 434).

In the light of these conceptual considerations, the following sections focuse on the relevant literature on Mercosur case. First, however, a brief and general exploration of the link of economic integration and human rights will be presented.

### 3.2. A Prelude to the Literature Review: Economic Integration and Human Rights

Given the exclusion of human rights provisions from the Treaty of Rome, it is intriguing to understand how and why the EU has developed an advanced human rights system. As it was addressed in the previous chapter, there are several arguments regarding the reasons of the EU's evolved human rights perspective, which are mainly gathered around legitimacy and judicial competition. However, since this thesis aspires to reveal the effect of economic integration on the development of the EU's human rights approach, it is required to evaluate these reasons in connection with integration process. As economic dimension of integration is significant in the EU, its impact on and its relation with other dimensions, which contains human rights, should be explored. To do so, before reviewing the literature on economic integration and human rights relationship in Mercosur, and before exploring this relationship in the EU in the last chapter, the economic integration and human rights relationship should be addressed. This is crucial for understanding the relevance of economic integration to the development of human rights approach of the EU. As human rights are

seemingly not directly related with economy, exploring the relationship between economic issues and non-economic issues in general and human rights in particular, can help us to understand the EU path.

Although human rights related issues have widely been studied in relation with international and regional organisations, the number of studies is relatively limited in the context of economic integration. In this sense, the EU is an exceptional study area. However, the large part of the studies that deals with internal aspect of the EU's human rights governance detaches themselves from the issue of economic integration-human rights link and take human rights protection within the EU polity as largely an autonomous issue. Externally, on the other hand, there is a relatively vast literature on the EU's human rights policy in connection with its economic cooperation and trade agreements. In this thesis, the focus is on the EU's internal human rights regime by utilizing comparative regionalism literature's perceptions. Therefore, especially in the EU context, this section -and the thesis- seeks to explore the economic integration and human rights relationship by omitting external relations dimension of regional integration projects and international relations in the context of trade liberalisation.[22]

In the following paragraphs, this link will be explored by visiting the studies from several perspectives, which can contribute to this exploration. In addition to development perspective, globalisation and regulation of the global forces will be mentioned as the highlights of the relevant studies.

### 3.2.1. Economic Integration and Human Rights: Irreconcilable Interests?

At first glance, the relationship between trade liberalisation and human rights, quite readily, can be expressed as rivalry. Indeed, there is a "classic conflict between trade and human rights regimes" (Nwogu, 2007, p.345). Moreover, "a tension exists between global (economic) standards and regional or national human rights choices and standards", too, whereas they might also fortify each other (Reid, 2015, p.283). Still, the growing engagement of economic integration schemes with human rights in an inclusive and positive manner indicates a mutually beneficial relationship albeit the

[22] The relationship between the EU and Mercosur is an exception in this regard, as it constitutes an important part of literature on Mercosur integration.

potential dangers and problems of taking human rights simply as "market-friendly human rights" or understanding them as a medium to regulate free markets, as it will be addressed below. In such a context, it is maintained that a balance between economic liberalisation and human rights can and should be struck according to the specific situation (Reid, 2015). This idea of balancing is the point where development perspective steps in the argument.

Today, at both regional and global level, human rights and economic integration relationship is covered mainly within development context. The most significant framework for this development perspective at global level is the United Nation's Sustainable Development Agenda and 17 Goals of this Agenda, as successor of Millennium Development Goals that expired in 2016. This developmental standpoint towards human rights at regional level is discussed in a few studies on different regional contexts (See, Musungu, 2003; Nwogu 2007; Reid, 2015; Giupponi, 2017). In Latin America, for instance, Giupponi argues that economic integration was initially seen as parallel to economic development, as in the case of Mercosur (Giupponi, 2017, p.68-69). Because of the regional and global developments after the mid-1980s, however, Latin American integrations started to perceive development in relation with social issues, too (p.68-69). Consequently, this social perspective leaded to a turn towards human rights (p.68-69).

In the context of Africa, the link is recognised, according to Musungu, by both relevant regional trade courts and bilateral trade agreements (2003). In this regard, the human rights regime of Africa, which is mainly provided by the African Union (AU), formerly the Organisation of African Unity (OAU), constitutes a reference point for regional economic organisations (Musungu, 2003, p.92). This reference is made through legal documents as well as judicial instruments and it includes civil, political, economic, social and cultural rights (p.92-93). Importantly, Musungu argues that civil and political rights, which are mainly covered in bilateral trade frameworks, and economic, social and cultural rights, which are covered in economic regulations in the region, should be conciliated with an aim to overcome the effects of trade liberalisation or economic freedom on welfare policies of states (2003). With regard to bilateral and multilateral trade frameworks, Musungu argues:

> The basic theory has been that where human rights are protected, open markets will flourish as stability and rule of law are ensured. Protection of civil and political rights has been seen as a necessary prerequisite for democratic governance which promotes trade and market access. It is therefore fair to say that in bilateral trade agreements, human rights have been approached from the context of their relevance for the administration of trade (2003, p.94).

From a similar perspective, Nwogu indicates that development is, in itself, deemed as a human right in ECOWAS and following from this, trade and human rights can be conciliated (2007, p.346).

While approaching to the subject from international law perspective, Reid also addresses the link of economic integration and human rights by grounding her arguments upon developmental approach to the issue (2015). Navigated by "sustainable development" and "proportionality" concepts, her study advocates for reconciliation of economic and non-economic goals by contending their reliance upon each other and introduces the EU as a guide for the World Trade Organisation (WTO) (2015).

Reid argues that as in the EU, the initial aims in the creation of the WTO –then he General Agreement on Tariffs and Trade (GATT)- were securing peace and achieving welfare, not promoting free trade *per se*. (2015, p.198 *et seq.*). Thus, by pointing out the sustainable development framework, she maintains that "trade liberalisation should not be pursued as an end in itself" (p.199). In this context, she notes that the WTO's legal framework also has rules and mechanisms with regard to non-economic interests albeit the main concern of this framework is trade liberalisation (p.199). Nevertheless, sustainable development framework requires combining economic and social dimensions of development and this does not contradict with "the wider objectives of economic liberalisation" (p.281). Thus, Reid contends that "there is no inherent conflict between trade liberalization and non-economic interests" (p.307) while highlighting the importance of agreement concerning values and interests as it was seen in the EU, which can be achieved at international level given the "considerable international recognition of sustainable development" (p.309).

In close connection with the acknowledgement of the link between economic integration and human rights, regulation issue comes to the forefront. The debates on

regulation are dealt on the axis of globalisation-regionalisation and on the axis of political-economic.

### 3.2.2. Regulating the Global

In relation with the subject of globalisation, there has been arguments with regard to regulation of global trade, such as Hettne's "return of the political" argument (Hettne, 2003), which is seen by Hettne and Söderbaum as a facet of "taming of globalisation" (2008, p.73). Hettne, grounding on Polanyi's "double movement thesis", argues that market liberalisation leads an eventual social unrest, which, in turn, ends up with an inevitable change in the direction of regulation (Hettne, 2003). This dialectical approach sees regionalisation as a counterforce against globalisation albeit not disregarding the fact that neither are only political or only economic (Hettne, 2003). Drawing from this argument, Hettne and Söderbaum maintain that "globalisation can be tamed through 'politicising the global'." (2008, p.77). On that, Söderbaum and Sbragia also note that neither globalisation can be confined to "economic" sphere nor regionalisation to "political" (2010, p. 572). They explain:

> In both processes political decisions shaped by contesting social and political forces are crucial, and the consequences in terms of distribution of resources are deeply political. […] the distinction between economic and political must not be exaggerated. […] 'political' […] refer[s] to efforts at creating political communities on various levels of the world system; but de-politicisation or deregulation is nevertheless also political in its redistributive consequences (p.78).

In this context, Sbragia points out the economic oriented view that sees regionalism as a threat to global trade by way of "preferential trade arrangements" (2008, p.37) although these are "[n]o longer competing metaphors, regionalization and globalization offer complementary rather than alternative routes to global order" (Fawcett, 2004, p. 434). In terms of globalisation and regionalisation relationship, Hettne and Söderbaum argue against the "'stumbling block vs. stepping stone' dichotomy", which sees regionalism as an obstacle to or a promoter of global trade, respectively (2006). Similarly, "'the new protectionism' vs. 'open regionalism'" arguments treats regionalism within this logic (Hettne, and Söderbaum, 2006). Hettne argues that "globalization and regionalization are indistinguishable" and "[i]t is, […] only relevant to speak of regionalization when there is a specific regional dimension,

for instance a regional approach to globalization" (2003, p.30). Likewise, Breslin, Higgott and Rosamond. contend that regionalism is both cause and effect of globalisation and that they are "mutually reinforcing and co-constitutive rather than contending processes" (2002, p.13).

In relevance with these dual readings, Musungu notes that

> [T]rade rules and the idea of economic liberalisation may also mean that the rules limit states in terms of welfare policies that are inextricably linked to socio-economic rights. From this perspective, globalisation has been seen as promoting what have been called 'market friendly human rights', while negatively affecting rights related to distributive justice. (2003, p.89).

When the close links of globalisation with regionalism and free trade are taken into consideration, it is not surprising that human rights dimension of globalisation phenomenon has also been dealt in the context of economic integration. In this regard, Nwogu draws attention to two divergent views, one contending the supremacy of "human rights principle"( Garcia, 1999 cited in Nwogu, 2007, p.345-46) in the face of globalisation and other arguing the reconciliation of human rights and globalisation under the same roof (Dunoff, 1999 cited in Nwogu, 2007, p.345-46). After pointing out this line of distinction in the literature, he argues that economic integration in Africa, which represents a facet of globalisation, is part of human rights regime of the continent by using the case of Economic Community of West African States (ECOWAS) (2007, p.346). In this context, he claims that development itself is seen as a human right in ECOWAS, rather than seeing human rights just as a part of development policy, and concludes that the former view, which sees trade and human rights as irreconcilable phenomena, is erroneous (2007, p.346).

Reid indicates the fact that international agreements on human rights have not dealt with regulation of trade as part of their protection mechanisms while also noting the peril of ranking human rights under trade law deriving from an erroneous approach to their relationship (2015). In this regard, she emphasizes the importance of recognizing the variations concerning the weight, status and content of rights for practical reasons (2015, p.255 *et seq.*). Based upon her argument that the problematic relationship between international law and WTO law, which arises from the fact that the WTO does not have the competence to enforce the rules other than the WTO's

albeit having the obligation to respect them, is also manifested in the international human rights law and WTO law relationship (p.255 *et seq.*). That is to say, Reid draws attention to the lack of regulation with respect to the possibility that the WTO's rules contradict with human rights (p.255 *et seq.*). By doing so, however, she does not favour to regulate human rights issues under the framework of trade law as an inferior set of values (p.255 *et seq.*). Her argument is, rather, that the problem should be dealt by a pragmatic view by also considering the need to determine the value that must be in priority according to the issue at hand (p.255 *et seq.*).

Hinted by these arguments, it seems that in the context of economic integration in a globalised world, human rights are dealt in market-focused terms and they are prevalently placed in development context, which is followed by regulation argument. This logic, however, has been subjected to some rightful criticisms. For instance, it is argued that the degradation of human rights protection to "regulation" in mere developmental terms despite the philosophical and political value of human rights brings along the risk of rhetorical respect for human rights rather than real protection (Pahuja, 2007). Another risk of dealing with human rights within the international free trade context is reducing human rights to trade related rights or economic freedoms like intellectual property rights. In this respect, Petersmann's argument regarding protection of economic rights within the WTO context in favour of economic rights and freedoms as part of market regulation (2000) carries such danger as pointed by Reid (2015, p.294-96). According to Reid, Petersmann's argument (2002) that advocates for the integration of human rights law into international trade law may fortify the current hierarchies as a consequence of reading non-economic issues under trade-related terms and deeming human rights as market-rights, which can allegedly secure the enjoyment of other rights (2015, p.294-96). Reid opposes this view and instead argues for the integration of the WTO legal order into the framework of sustainable development, by adopting a pragmatic approach rather than an ideological one (2015). To put this framework in practice, Reid argues, the adjudicative mechanism in the WTO should be "refined" and "the objectives and purpose of the WTO and trade liberalisation" should be "reframed" (p.307).

In a similar vein, Reid refers to Ruggie's qualification with regard to the GATT's creation as reflection of "embedded liberalism" (1982), which does not consider trade liberalisation free from state intervention for a stable domestic order (2015, p.293). In connection with this, she also refers to Howse (2002) to indicate the downfall of embedded liberalism towards the end of the twentieth century due to "depoliticisation" of free trade by "technocratic elite" (p.293).

By drawing from several studies that recognizes the link of human rights and economic integration and trade liberalisation's effect on social issues, Reid maintains that welfare benefits of trade liberalisation should be subjected to regulation to mitigate its social costs and that the narrow neo-liberal reading of trade liberalisation is inadequate to overcome the global problems (p.286 *et seq.*).

It is clear that change towards a social perspective in integration projects derive from the abovementioned regulatory and developmental logic in addition to morally recognised claims such as prosperity of citizens and a just social order (Grugel, 2005, p.1073). In sum, with globalisation, and accompanying regionalisation processes, trade liberalisation and market integration became more significant and the issue of human rights protection in relation with these processes became more pertinent. Against this background, the close link between economic integration and human rights is evident. In which ways these two interact with each other in the EU will be tried to be explored by utilizing Mercosur case. The remaining of the literature review endeavours to reveal this relationship in Mercosur.

### 3.3. The Development of Human Rights Approach of Mercosur from Comparative Regionalism Perspective

In this section, the development of Mercosur's human rights approach in relation with its economic integration will be explored with an aim to draw insights for the EU case. For doing so, a general view of Mercosur integration will also be captured. As the literature on Mercosur integration in general, and the development of its human rights approach in particular, accommodate its relationship with the EU, the interaction between these two regions will be covered, too. First, however, selecting the case of Mercosur will be further justified in the next section, as mentioned above.

### 3.3.1. Mercosur as a Comparable Case with the EU?

As it would widely be accepted, the EU has been a successful economic integration model albeit the crises that it has been through. Nonetheless, it has attracted attention because of its not only economic success but also social and political dimensions of its integration model. Consequently, the studies on integration and international trade's relationship with other issues, such as social cohesion, environment or human rights, extensively put the EU under scrutiny.

There are several economic integration and cooperation projects at regional level other than the EU, such as the North American Free Trade Agreement (NAFTA)-now Canada-United States-Mexico Agreement (CUSMA)-, the Southern African Development Community (SADC), the Association of Southeast Asian Nations (ASEAN), the Andean Community (CAN) and the Southern Common Market (Mercosur). While there is a vast body of literature on political dimension in general and human rights protection in particular, of European integration, it is hard to find similar examples for most of the other regional economic projects. For example, although both the EU and NAFTA can be considered as "children of the globalizing wave" (Bislev, 2017, p.2), which were established in 1993 and 1994 respectively, it is not possible to consider the EU and NAFTA as comparable cases especially in terms human rights protection.

On the other hand, it is maintained that the Southern Common Market (Mercosur) is, following the EU, one of the most successful examples of regional integration (Malamud, and Schmitter, 2011, p.4; Giupponi, 2017, p.6). In terms of the dimension of human rights, it is among the most outstanding regional integration projects, which intensely occupied with economic issues. Within Latin American regionalism, Mercosur is shown as an exemplary case of advancing democracy and human rights (Carranza, 2014 cited in Bianculli 2016, p.165). Even though Mercosur's intergovernmental and pragmatic nature, which reminds the WTO model, can be criticised because of its narrow focus on trade and little attention to human rights related issues (Franca-Filho, Lixinski, Giupponi, 2014, p.822), Mercosur example still allows us to utilize it for a research on the EU integration model and its relationship

with human rights. Therefore, to review the literature on Mercosur -in conjunction with the EU- seems useful to help answering the research question of this thesis: has the EU's economic integration influenced the development of its human rights approach?

Appropriateness of comparing Mercosur with the EU might be argued in terms of the different member state characteristics and certainly power differences across these regions' members should be taken into account for a careful comparison as Söderbaum and Sbragia argue (2010). Furthermore, their institutional structures and legal orders are considerably distinct from each other, despite the EU's influence on Mercosur integration, which will be addressed below. However, my aim is not to weigh Mercosur against the EU model, or *vice versa*. Nor is it a complete comparison of their integrations and human rights systems. The review of relevant literature intends to draw some insights for understanding the EU's human rights path, especially with a view to reveal the link of economic integration with human rights, by bearing in mind that the comparative analyses should be performed cautiously. Therefore, although Europe has been used as a model that other regional projects are compared to, in this thesis, I will utilize Mercosur example to reflect on the EU's development in the field of human rights in relation with its economic integration.

Nonetheless, before moving to the literature on the EU and Mercosur, it seems useful to mention Mercosur integration within a wider regional context to understand the conditions under which it emerged and it functions and to set the wider scene in international environment.

### 3.3.2. Mercosur in the Overall Context of Latin American Regionalism

In contemporary sense, the economic integration efforts in Latin America can be dated back to 1960s (Cason, 2000; Kaltenthaler and Mora, 2001; Guipponi 2017). Prominent examples of these efforts can be named as the Latin American Free Trade Association (LAFTA) (1960) and its successor the Latin American Integration Association (ALADI) (1981). Nevertheless, these early attempts are not considered as successful (Cason, 2000; Kaltenthaler and Mora, 2001; Bianculli, 2016, p.156). On the other hand, as it is widely accepted, new regionalism wave of 1990s leaded to a

regeneration in Latin American economic integration search. The preconditions of this revitalisation in the region are pointed out as the developments of the 1980s such as debt crisis (Cason, 2000; Kaltenthaler and Mora, 2001) and democratic transition (Cason, 2000; Kaltenthaler and Mora, 2001; Bianculli, 2016, p.157). In this vein, the shift after the crisis in the late 1990s was also important for a new approach to the economic integrations that were set off earlier (Cason, 2000; Kaltenthaler and Mora, 2001). The critical view towards neoliberal integration path brought along the possibility to include social dimension in the process (Guipponi 2017, p.16). The uneasiness with regard to neoliberal policies in Latin America started a new period (post- Washington Consensus) that gives due regard to civil society and the needs of citizens with social agendas of leftist governments in 2000s (Grugel, Riggirozzi, and Thirkell-White, 2008; Guipponi 2017). Bianculli argues that social issues were neglected in Latin American regionalism until the waning of neo-liberalism (2016, p.164-65). In relation with this, relaunch of Mercosur also coincides the left-turn of the 2000s, a time when neoliberal ideas lost their weight (p.158). The rise of open regionalism in the region can also be seen as a facilitator for the adoption of a social perspective as open regionalism means "a comprehensive strategy aimed at stimulating technological innovation, production integration, and equity, through more active social policy" with an end to integrate in global economic system (p.158).

In compliance with these accounts, the motivations behind Latin American regionalism can be summed up as exogenous and endogenous factors, as addressed by Bianculli. She identifies two exogenous factors: the global order and the influence of foreign agents. As for endogenous factors, political issues that occupy intra-regional actor's agendas can be indicated (2016).

It seems that the most decisive exogenous factor is the international economic environment. The most important foreign actor that has had an influence on Latin American regionalism, on the other hand, is arguably the EU. While the EU has been also influenced by international environment, it has had a distinct position *vis-à-vis* other regional integration and cooperation projects as it played a globally more active role. The EU's direct influence on Mercosur's –along with other Latin American regional projects- institution-building process is highlighted by Börzel and Risse

(2009). By way of financial support and political dialogue, the EU motivated Mercosur to create a community law and regional institutions. Although the intergovernmental framework is the marker of Latin American regionalism (Bianculli, 2016, p.162),[23] the EU has had an influence on Latin American integrations' institutional structures, as well as its other aspects, as it is mostly argued in diffusion studies. As Giupponi states, when it comes to institutional, legal and policy related aspects of Latin American (economic) integrations, the EU effect on the region come to the fore (2017). In this context, Lenz indicates the influence of regionalism experience of North America along with Europe in the beginning of 1990s on the emergence of Mercosur in addition to the EU's influence on the choice of Mercosur's institutional framework (2018). In addition, the interregional relations between the EU and Latin American countries, unlike the US approach, have not solely committed to trade issues; they also included political and cultural issues and technical assistance and they grounded on "the EU's good governance principles, including the respect for human rights, democracy, and the rule of law" (Börzel and Risse, 2009, p.12).

Giupponi argues that as one of the most important components of an advanced regional integration, democracy and its promotion lead to the inclusion of human rights, as a company of democracy, to these processes (2017, p.48 *et seq.*). Other important components of this kind of integration are development perspective and "community law" characteristic (p.48 *et seq.*). There is also an interplay between democracy and development (Giupponi, 2017, p.70). Furthermore, steering away from trade-focused integration, Latin American integration processes reinforced by the inclusion of issues like labour rights, especially after 2005 (Giupponi, 2017, p.28-29). In this context, an important aspect of Latin American regionalism, especially for the purposes of this thesis, is its social dimension and this seems as, at least partly, resulted from internal motivations. This is important because of its implications for the inherent relevance of economic integration to social matters and the rights issue, which bases one of the main arguments regarding the EU case. Philips and Prieto, by taking

[23] This is explained by Bianculli by pointing out the "presidentialism" in Latin American countries. The adherence to sovereign power and the search for autonomy explain this institutional design (Bianculli, 2016, p.162).

political and economic (new) regionalism in formal sense argue that Latin American new regionalism projects, which started in 1990s, proved to be unsuccessful while regionalisation, as a more comprehensive process with participation of non-state actors as well as states in a system functioning in political, economic and social areas, arose at the end of the 2000s . (2011, p.116-17). Social issues were started to be addressed towards the end of new regionalism decade, as "a form of 'developmental regionalism' that went beyond an orthodox version of neoliberalism" (p.119). However, according to Philips and Prieto, constructivist approach to regionalisation, as in the case of Asia, became a distinguishable feature of Latin America at a rhetorical level, by yielding no actual results (p.120). Mercosur, from this perspective, lost its assertiveness in the mid-2000s (p.118). Likewise, Bianculli argues that this new way has not reflected on the relations between the actors of social and economic realms (2016, p.160). Still, social dimension of Latin American regionalism constitutes an important element, which is developed enough to argue upon -and to utilize for the EU case in the specific context of Mercosur.

As it is illustrated in these arguments, the rights issue has been a remarkable component of Latin American integration schemes. Albeit immature, Latin American (sub)regional integration projects such as Central American Integration System (SICA), CAN and Mercosur are considered as promising human rights protectors (Giupponi, 2017). While it is hard to find a human rights protection regime in Latin America equivalent to the EU's, it is still possible to find some similarities between the paths they followed towards a framework for protection of human rights. For instance, according to Giupponi, the evolution of human rights in Latin American economic integration projects followed a similar path to the EU's: they were not included in the initial legal frameworks of these projects (2017, p.6) Similarities of this sort can help us to draw some insights for understanding the EU road by also taking into consideration its idiosyncratic features.

After the wider regional context in which Mercosur integration is located, the focus will be on the EU and Mercosur relationship in the following sections because of the EU's way of interaction with Mercosur constitutes an important facet of their comparison in terms of both economic integration and human rights.

### 3.3.3. Mercosur Integration

In Mercosur, Cason argues, integration started as a formal process, which was based on neoliberal motives of Argentina and Brazil presidents (2000, p.288). Later on, however, integration gained a weight individually in a way that make it unlikely to reverse the process (p.288). Kaltenthaler and Mora also indicate to the motivations of domestic (state) elites for Mercosur integration project, nevertheless, in addition to economic concerns, they refer to the security issue between Argentina and Brazil (2001). In this regard, referring to neo-functionalism, they contend that, originally, Mercosur integration followed a similar logic with the EU's as economic interdependence could create a peaceful relationship between member states (2001, p.345 *et seq.*). The similarity between the two project's emergence conditions is also pointed out by Lenz by stating, for instance, the nuclear rivalry between Argentina and Brazil (2017). Democracy, Kaltenthaler and Mora add, was another motivation for these elites, along with economy-related considerations (2001). Notwithstanding the security logic of Mercosur integration, Kaltenthaler and Mora explain the weaker legal and institutional framework by pointing the reluctance of state elites of Argentina and Brazil to dismantle intergovernmental structure as their security concern were not as strong as the EU's founding members France and Germany (2001).

With respect to theory, Malamud argues that Mercosur cannot be explained by EU-originated integration theories as it came into being by government initiatives (2015, 163-179). Building on Mattli's conceptualisation of "demand and supply conditions" in explaining regional integration (1999), he asserts a third condition to explain "inertial factors" in Mercosur, which is "institutions" (2015). While "transnational transactors" give rise to the formation of the demand-side because of "the potential of economic gains that arise from higher levels of regional interdependence", "regional leadership" constitutes the supply-side (2015, p.163-164). The European Commission and the European Parliament are the examples of "supranational entrepreneurship" as a type of "regional leadership" according to Malamud, whereas their counterparts in Mercosur do not have such a role (p.163-164). "Intergovernmental diplomacy" that indicates another type of leadership, on the other

hand, is the outstanding character of Mercosur (p.163-164). As regards the third condition, which comes into play when the other conditions cease to be in effect, it has not been sufficient since Mercosur lacks strong legal, administrative and judicial frameworks (p.163-164). In other words, integration in Mercosur has solely been driven by the leaders of member states, if it has, and consequently, its integration path diverged significantly from the EU's (p.174-75). This point highlights the vital role of legal and institutional design of the EU, which could allowed the EU not only to further its economic and political integration but also to develop an advanced human rights approach over the course of the project. To contrast these features of the EU and Mercosur put an emphasis their common aspects in terms of the relationship between economic integration and human rights.

From a similar perspective with Malamud, Hummel and Lohaus also refer to Mattli (1999) in explaining Mercosur integration (2012). In the supply-side, they dwell on "interpresindentialism" and the position of the "paymaster" member state, Brazil (2012). Additionally, they share Malamud's view that Mercosur has some deficiencies in terms of institutional framework and enforcement of Mercosur law (2012).

In the light of these evaluations of Mercosur integration, the literature on its interaction and comparison with the EU will be covered in the next section with an end to better understand the development of its human rights approach. Accordingly, first, I will touch upon the studies that deal with the EU-Mercosur similarities and differences or their relationship with each other by drawing from integration and diffusion studies as well as studies on inter-regionalism. Then, I will explore the studies on the human rights dimension of Mercosur integration. While reviewing the literature, I will also comment on some important points that can help to answer my research question.

### 3.4.The Literature on the EU-Mercosur Interaction and Comparison

The literature on the EU-Mercosur comparison or interaction in the field of human rights is rather limited while there is a relatively vast literature on their comparison or interaction in general. In fact, especially the place of human rights in

Latin American integration projects -that have an economic dimension- seems overlooked in the literature (See, Franca-Filho, Lixinski, Giupponi, 2014, p.811; Giupponi, 2017, p.1). Still, when the EU's peculiar integration model's effect on its human rights perspective is taken into account, a general review of literature on the EU-Mercosur comparison or interaction seems illuminating as well as a review of the related studies with a special focus on human rights for understanding the EU's human rights perspective's evolution in relation with its economic integration.

As the literature on the interaction between Mercosur and the EU will demonstrate, the former's institutional structure and integration process are closely linked with their relationship. Mainly the studies that focus on interregional relations and diffusion put this relationship under scrutiny.[24]

In the light of the foregoing, before reviewing the literature on Mercosur's institutional structure, interregionalism and diffusion oriented studies should be visited briefly.

### 3.4.1. Interregional Relations Perspective

*Stricto sensu*, interregionalism refers to the relations between two regional organisations while *lato sensu*, it also indicates transregional relations between a regional organisation and a regional cooperation group or between two regional cooperation groups (Doidge, 2011, p.2-3). In parallel to this definition made by Doidge, Hoffmann views interregionalism in relation with formal regionalism and transregionalism in connection with informal regionalism/regionalisation (2016). Accordingly, integration levels of regions are not determinant for interregional relations. However, Doctor maintains that a certain degree of regional integration is a precondition of a "coherent and meaningful" interaction" (2015, p.969). Following these approaches and the conceptual framework adopted above, Mercosur and the EU relations represents an example of interregionalism in a narrow sense.

[24] As stated by Hoffmann though, diffusion approaches can be seen as part of interregionalism literature along with EU foreign policy, IR and IPE approaches (2016).

The relationship between the EU and Mercosur has had two main dimensions; "economic exchanges and the support of Mercosur's institutional capacity", according to Mattheis and Wunderlich (2017, p.729).

Doctor deals the issue of the effect of interregional relations between the EU and Mercosur on Mercosur's integration (2015). Drawing from Doidge (2007), Hanggi (2003) and Rüland (2010), Doctor states that interregionalism has five functions according to the relevant literature, namely balancing, rationalizing, agenda setting, institution building and collective identity formation (2015) and due to their different levels of integration, the interregional relations between the EU and Mercosur is mostly serves a 'capacity-building' function, as indicated in the literature (p.969). In this sense, the EU uses several tools that encompass technical, financial and administrative areas along with attractive interregional cooperation models, which in turn effect the institutional structure of Mercosur. The EU, she argues, has used interregionalism as a way of exercising its "normative power" (Manners, 2002 cited in Doctor, 2015), in addition to material benefits, and it promoted human rights, democracy, good governance, "social inclusiveness, socioeconomic development" along with its integration model (p.971). Despite the influence of the EU, Doctor emphasizes that Mercosur integration is mainly dependent on the political will of its members (p.971). In a similar vein, Mattheis and Wunderlich suggest that although the EU fostered Mercosur to bring its institutional structure in line with the EU's and leaded to the creation of quasi-EU institutions, Mercosur members did not opted for a supranational model of integration (2017, p.729).

Costa and Dri cover the role of European Parliament (EP) on the EU's interregional relations and particularly its effect on Mercosur's institutional structure by contributing to the creation of Parlasur (2014). As part of this role, EP also promoted human rights while engaging interregional relations.

The influence of the EU's economic integration model on Mercosur is also viewed from interrregionalism perspective. According to Doidge, while "old regionalism" corresponds to "closed regionalism", "new regionalism" is parallel to "open regionalism" (2011). The first stage of interregionalism, on the other hand, is the imperial regionalism of the interwar years (Doidge, 2011). Open regionalism that

started to dominate regionalism in developing regions is corollary to "the neoliberal development paradigm", which is promoted by hegemonic powers and International Financial Institutions (IFIs) (Doidge, 2011, p.12). In this period, the EU influenced other regions' forms of cooperation by using its newly created foreign policy competence and by arousing a desire for integration with the effect of Single European Act's aim of completing single market (p.13). Open regionalism period was also marked by a new development paradigm, which was in close relationship with neoliberal market economy perspective promoted by Washington Consensus (Doidge, 2011, p.13-14). From this perspective, interregional and transregional relations served as "building blocks" of neoliberal economic globalisation, rather than "stumbling blocks" (Hoffmann, 2016, p.605). It can be argued here that economic integration in both the EU and Mercosur have functioned in a similar pattern sharing a similar perspective, which might yield some similar social/socioeconomic results.

### 3.4.2. Diffusion Approaches

While comparative regionalism literature decentralised the EU in its research agenda, the EU and European integration theories are still found useful in explaining emergence, institutional design, policies and effectiveness along with other aspects of other regional projects. In this regard, diffusion concept constitutes an important part of regionalism literature. At first glance, this might seem inconsistent, however as Börzel and Risse put it "[d]iffusion rarely results in 'copy and paste,' but in the selective adoption and transformation of models of pooling and delegating authority, of which the EU arguably is the most prominent one" (2019,p.1245-46). Parallel to this, they emphasize that diffusion does not lead to the creation of identical institutional designs and in this regard, they refer to Acharya's "norm localization" concept (2004) to highlight selective emulation approach adopted by most regional organisations (2019, p. 1244-5).

Börzel also argues that parallels in institutional structures do not stem from interdependence of the choices that intends to emulate other institutional structures; "actors in different regions take similar decisions in response to similar external challenges or problems" (2016, p.44). When it comes to the EU's influence on other

regions, Risse argues that despite its advocacy for regionalism, its institutional layout and regional policies, the EU is the more successful the less it attempts to do so, by leaving the choice of emulation to the regional actors that deem the EU as "a legitimate problem-solving model" (2016, p.101). From a similar perspective, Jetschke and Lenz argue that internal and external factors are not in stark contrast with each other and different regionalism processes do not occur in isolation from each other (2013).

Building on his previous studies with Börzel (2009), Risse sets forth mechanisms of diffusion (2016). According to Risse, diffusion can be derived from "direct (or "sender driven") influence mechanisms" or "indirect (or "recipient-driven") mechanisms", however, direct influence does not necessarily be coercive (2016). In fact, he puts forward that direct mechanisms are mostly the means of motivation or *vice versa* that form the preferences of recipient regional organisations or they function in a "logic of appropriateness" to comply with the social norms and to convince the relevant actors. As for indirect mechanisms, they can result from "competition" or "lesson drawing" as well as from "normative emulation" or "mimicry" (2016). Similarly, Jetschke and Lenz identify three mechanisms of diffusion as "competition", "learning" and "emulation" (2013). As an alternative to these three mechanisms, Lenz also identifies another mechanism, namely "frame diffusion mechanism" (2017).

By stating the inadequacy of accounts derived from international political economy, neo-functionalism and realism in terms of explaining the convergence of institutional frameworks in different regions, Lenz accounts for similar institutional choices by employing "frame diffusion mechanism" as his explanatory medium (2017). According to Lenz, "common market *frame*", which also has a community building object, was constructed within post-World War II West European context as a response to specific challenges, i.e. security concerns and economy-related issues (2017). In Mercosur, this frame is adopted as the policy-makers had a community-building purpose in addition to economic motivations (2017).

With respect to outcomes of diffusion, Risse contends that diffusion mechanisms do not result in an indiscriminate acceptance of the objects of diffusion, i.e. institutional design or governance in a certain policy area of regional project or the regional project *per se*, excluding "mimicry", as diffusion process indicates a constant

"translation and transformation" conducted by recipients (2016). In this connection, he highlights "localization" concept drawing from Acharya: Acharya defines localization as both process and outcome which creates a coherence between exogenous and endogenous norms (2004).

In the following, diffusion studies with respect to Mercosur case will be addressed as they are enlightening for understanding its institutional structure and legal framework, which potentially have important effects on and implications for its economic integration model and human rights approach.[25]

### 3.4.3. Institutional Structure and Legal Framework of Mercosur

The chapter on the history of the development of the EU's human rights approach showed the important role played by the EU institutions. Their importance mainly stems from the institutional design of the EU. In addition, the previous chapter set out the decisiveness of the EU's legal framework for its human rights path. Therefore, it is relevant to address the studies on Mercosur's institutional design and legal framework for accounting its human rights road.

The institutional structure and legal framework of Mercosur are prescribed by the founding texts, which are the Treaty of Asunción (1991), the Protocol of Ouro Preto (1994), the Protocol of Olivos for Dispute Settlement in Mercosur (2002) and the Constitutive Protocol of the Mercosur Parliament (2005). According to Article 2 of the Protocol of Ouro Preto, Mercosur institutions with decision-making powers are the Council of the Common Market, the Common Market Group and the Mercosur Trade Commission. The Article also explicitly states that all of these bodies are intergovernmental. Other institutions that are envisaged in the Protocol are the Economic-Social Consultative Forum and the Administrative Secretariat. On the other hand, the Joint Parliamentary Commission became the Mercosur Parliament (Parlasur) with the Constitutive Protocol of the Mercosur Parliament in 2005 while Dispute

[25] There are many studies that examine the EU's influence on the regions other than Latin America or its promotion of its own model of integration in its interregional relations. (See, *inter alia*, Farrell, 2009; Haastrup, 2013; Söderbaum, 2007; Jetschke and Murray, 2012; Alter, 2012).

Settlement System was rearranged and the Permanent Review Tribunal was established with the Protocol of Olivos in 2002.

The Council of the Common Market, which consists of the Ministers for Foreign Affairs and the Ministers of the Economy of the member states (Protocol of Ouro Preto, Article 4), is the highest political institution in Mercosur. It steers the integration process (Article 3) and assumes the legal personality of Mercosur (Article 34; Article 8/III). The Common Market Group is is the executive body (Article 10) while the Mercosur Trade Commission is mainly responsible for assisting the Common Market Group and to monitor the application of the common trade policy instruments (Article 16).

As stated by Lenz and Marks, different theoretical perspectives provide different explanations for the causes of regional institutional design (2016). For instance, realist view sees institutional designs of regional organisations as a reflection of power relations (2016). From an institutionalist perspective, institutional design is formed by reactions of rational actors to external environment (2016). According to constructivists, on the other hand, actors are bound by the normative structure to which they are attached (2016). In addition to these perspectives, diffusion concept also accounts for institutional designs of regional organisations by emphasising their interdependence (2016). Furthermore, they argue that regional institutional designs have the potential to effect several issue areas, namely peace and security, welfare, domestic institutional structures and actorness at international level (2016). In fact, human rights can be included in these areas, be it peace and security or welfare, as a specific concern. Consequently, as it can be seen in the EU case, institutional design constitutes an important element in terms of developing a human rights perspective and its way of development in a regional organisation.

From the point of view of historical institutionalism, institutional orders of regional free market/trade organizations, i.e. NAFTA, EU and Mercosur, are decisive

on the ("cognitive") (Duina, 2004, p.360)[26] choices of actors ("market officials") (p.375). According to Duina, "law and cognitive standardization" in member states and the choices of strong interest groups, and thus, NAFTA's minimalist approach (p.365 *et seq.*) and the EU's and Mercosur's interventionist tendencies (p.366 *et seq.*)[27] are consequences of their constituent institutional settings (p.374 *et seq.*) Within this regard, legal traditions (e.g. common law or civil law) or political structures (federal or unitary) of member states as component parts of regional organizations can be articulated among key determinants for these organizations' abovementioned peculiarities (p.374 *et seq.*). In contrast with NAFTA's avoidance from formally specified cognitive notions, the EU and Mercosur have an extensive secondary law to specify them, albeit in different ways as in the cases of worker's rights and specific regulations with regard to women as part of labour force (p.374 *et seq.*). On the other hand, Lenz argues that the adoption of European common market model instead of NAFTA's free trade agreement model can be seen as an effort to be a viable project in the face of the threats stemming from the changes in the external environment (2012, p.160). Departing from the literature that focuses on internal factors, such as "constellations of power, interests and institutions", reacting to the developments in the world, and functional approach concerning regionalism, Lenz draws attention to external influences (2012, p.157). He utilizes diffusion concept to explain the role of the EU as an external influencer on regional integration (2012). By doing so, however, it is not assumed that there is "an asymmetric/hierarchical or even direct relationship" between the EU and Mercosur (Börzel and Risse, 2012 cited in Lenz 2012, p.157). Rather, the EU model passes through the filter of policy maker's normative codes (p.170). Within this respect, Lenz argues that disparity between formal models of the EU and Mercosur mirrors "differences in institutional and political contexts (e.g. democracy, statehood etc.) for lesson-drawing and divergences in normative

[26] Duina classifies cognitive notions as ontological and normative. While ontological notions define the world as it is, normative notions concern how the world should be according to a shared vision. (Duina, 2004, p.360).

[27] "Officials in the EU and Mercosur have adopted a rather aggressive approach to cognitive standardization." (Duina, 2004, p.366 *et seq.*)

convictions (e.g. attitudes about sovereignty) in the case of normative emulation (p.159).

For Lenz, nevertheless, the role of state capacity and regime character are not as important as the adoption of "spurred emulation" by domestic actors -"domestic advocacy coalitions and epistemic communities, including the two smaller member states and regional institutions"- in Mercosur that are empowered by the accomplishments of European integration itself in addition to the EU's direct support to explain the EU's effect on Mercosur's institutional structure (p.170). Lenz argues that the role of the Supreme Courts in Mercosur, as an epistemic community, in addition to the Permanent Review Tribunal's references to CJEU rulings and Parlasur's support for the creation of a CJEU-type court can all be seen as reflections of spurred emulation (p.169).

With respect to the EU's effect on Latin American integrations –and Mercosur-, Malamud states that the EU has been influential on modern Latin American regionalism both as an exemplary model and as direct supporter by its funds (Malamud, 2020, p.1). For instance, the EU's single market plan for 1992 incited the creation of Mercosur, along with the US effect (p.7-8). In addition, not only substantial but also institutional aspect of Andean Community replicated the European model (Vervaele, 2005, p.390). Similarly, the objectives of Mercosur that are set forth in Article 1 of the Treaty of Asuncion as establishing a customs union and a common market with free movement of goods, services, labour and capital, in addition to coordination of policies in certain areas and harmonization of legislation in member states accordingly evoke the European way of integration (p.390). However, despite the influence of EU model on Mercosur, as far as institutional structure is concerned, the differences between the two are noteworthy (p.390). In this sense, Malamud argues that the main divergence point between the EU and Mercosur concerns their institutional structure (2020, p.4; p.8).

Malamud and Schmitter elaborate on Mercosur's intergovernmental structure by reflecting on neo-functionalism (2011). As a radical version of

intergovernmentalism, "interpresidentialism"[28], as stated by Malamud (2003 cited in Malamud and Schmitter, 2011, p.16) does not allow a spill-over effect to take place in Mercosur (Malamud, 2003 cited in Malamud and Schmitter, 2011, p.16). Seemingly, under intense presidential initiative, there is no bearer of supranational institutional perspective that can lead the occurrence of a spill-over effect. By the same token, Vervaele refers to European integration history for arguing that regional integration cannot be achieved by an intergovernmental model and Mercosur strive to balance its community goals and its intergovernmental institutional structure (2005, p.407-8).

An important result of Mercosur's institutional design is the effect that it has on its legal framework. While the EU's institutional structure "combines pure intergovernmentalism, pooled intergovernmentalism, and supranational delegation", Mercosur's is "purely intergovernmental", and even "interpresidential" as stated above (Malamud, 2020, p.6). This dyadic approach, instead of the EU's triadic system, is also adopted in dispute settlement mechanism of Mercosur (2020, p.6). Thus, even though Mercosur states are bounded by a dispute settlement mechanism, there is no real supranational institution to monitor the implementation and interpretation of Mercosur law (Vervaele, 2005, p.394). Moreover, in terms of the application of community law, the lack of direct effect principle in Mercosur can be regarded as an important problem since their incorporation in domestic law might remain in low rates (p.394). The importance of direct effect principle in the development of the EU's human rights system, as it was addressed in the previous chapter under the head of the role of the EU institutions, makes one to think that the lack of the principle in Mercosur law can be one of the reasons of Mercosur's underdeveloped human rights dimension when compared to the EU. Likewise, a supranational judicial organ has been the key to effectively protect, and even promote human rights while defending community law's position in the EU. Still, it should be noted that Mercosur's initial intergovernmental dispute settlement mechanism gradually institutionalized and, among the debates on Mercosur's legal integration by establishing a CJEU-type court,

[28] "Interpresidentialism is the outcome of combining an international strategy, presidential diplomacy, with a domestic institutional structure, presidential democracy." (Malamud and Schmitter, 2011, p.16).

which has the competences of giving preliminary rulings and reviewing the litigations against community acts (Karen, 2008 cited in Lenz, 2012, p.164), became a permanent review tribunal (Tribunal Permanente de Revisión) (Lenz, 2012, p.167-69). Given the fact that the CJEU allowed for the path towards an enhanced community law and in particular, for the development of fundamental rights law in the EU, the creation of a stronger dispute settlement system in Mercosur can be considered as an important step forward. However, Mercosur's review tribunal has not developed a case-law on human rights and their inclusion in it "proved to be a step too far" (Hoffmann, 2015, p.4).

In addition, because of its intergovernmental structure, subsidiarity principle did not emerge in Mercosur (von Staden, 2016, p.33-34). In a system where member state governments has the capability to veto decisions, the principle subsidiarity has not been demanded (p.34). This absence is also clear in Mercosur's judicial system, which gives a considerable discretion to its member states (p.34-35). Given the focus of Mercosur on regulating external economic matters, rather than internal ones, formal recognition or any other kind of employment of the subsidiarity principle is not considered likely (p.34-35). In contrast, the principle of subsidiarity is an important feature in the EU. It steers the power relations between the EU and member states as a constitutional principle and it can both limit and extend the EU's legislative power according to the specific situation (Fabbrini, 2016, p.19). To protect human rights, subsidiarity principle can enable the EU to act in its supranational capacity, when member states' actions are inadequate (p.19-20). However, the principle is also significant for the EU's actions and policies regarding economic and political integration. Therefore, it is of relevance to determine the balance between economic integration and human rights protection.

Furthermore, while there is an equivalent body to European Council in Mercosur as the Council of the Common Market, the Secretariat can hardly be considered as equivalent to European Commission (Vervaele, 2005, p.391-92). Having said that, whereas there have been no functionally similar institutions like the Commission or the Court of Justice of the EU in Mercosur, still, Parlasur, which is the Parliament of Mercosur, is considered as the potential engine of further integration (Malamud and Dri, 2013, p.224).

Despite the similarities between the EU and Mercosur economic integration models, Mukhametdinov argues that the two blocs are fundamentally different from each other in non-economic terms (2007). While the EU's influence on the region is incontestable, unique conditions of its integration, as in the case of cultural bounds, requires developing a context-specific approach towards Mercosur (Mukhametdinov, 2007). In this vein, legal frameworks of these two organisations, for instance, are strikingly distinct. The most significant differences between Mercosur and EU laws, which are critical for the development of human rights, are the lack of direct effect and supremacy principles in Mercosur law. Likewise, the absence of the principle of subsidiarity in Mercosur law is also decisive for the route of the development of the human rights approach of Mercosur. Additionally, as the Protocol of Ouro Preto requires the incorporation of community law into domestic legal systems of member states (Article 40; 42). Mercosur law is not directly applicable. On the other hand, the legal personality of Mercosur (Article 34), despite its intergovernmental nature, is seen as a potentially supportive element for cooperation in the field of human rights (Giupponi, 2017, p.7).

It can be concluded that the literature demonstrates Mercosur's inclination to develop a regional integration model similar to the EU's, which includes a human rights protection system, whether it is realized by the push of the EU or by Mercosur's own initiative. Either way, it seems plausible to take Mercosur's integration as a reference point to explain the economic integration-human rights relationship.

### 3.5.Economic Integration and Human Rights Relationship in Mercosur

Although international human rights law can be seen contradictory to trade from economic liberalism's point of view, human rights found a place in international trade law, especially as part of regional economic integration projects with political ambitions (Franca-Filho, Lixinski and Giupponi, 2014, p.811-12).

The "new regionalism" wave of the 1990s brought about a gradual standardization process with regard to labour and environmental issues and mechanisms for fundamental rights protection (Franca-Filho, Lixinski and Giupponi,

2014, p.815). Eventually, the "social dimension" of regional integration became a driving force for the development of human rights (Giupponi, 2017, p.7).

Nevertheless, human rights and economic integration relationship in Latin America and particularly in Mercosur, is not dealt with in literature as much as in the EU case, in particular in English written literature. This, of course, is closely related with the fact that the EU has a long integration history that goes back more than half a century. However, this can also be considered as a reflection of the EU's closer relationship with human rights, along with the fact that human rights find their way through Latin America at least partly because of the EU influence. Still, Mercosur's approach to human rights dimension of integration drew some scholar's attention.

Franca-Filho *et al.* argues that, in Mercosur, the issue of human rights has found a place from its start mainly because of the member states' poor record with regard to democracy (Franca-Filho, Lixinski and Giupponi, 2014, p.818). On the other hand, according to Hoffmann, Mercosur started to set a human rights agenda in the mid-2000s by adopting binding norms and designing programs and instruments (2015, p.192). Giupponi also traces Mercosur's human rights approach's development by taking into consideration the four stages of Mercosur integration that she pinpointed as "transitional period" (1991-1994), "consolidation and deepening" (1994-2000), "relaunching" (2000-2006) and "expanding and deepening" (2006-present) (2017, p.328-29). Accordingly, the developments of the first period regarding human rights were quite limited whereas the third and the fourth periods brought along some advancement (2017, p.328-29). The second period, on the other hand, was the most significant one (p.328).

Currently, Mercosur has a legal and institutional framework with regard to human rights. For example, it has a unit called the Institute of Public Policies on Human Rights (IPPDH) which "aims to strengthen human rights as a fundamental axis of regional identity and integration through cooperation and coordination of public policies" (Mercosur, n.d., Human Rights) and High Authorities Meeting on Human Rights (RAADH) with its several permanent commissions. In addition, the main document of Mercosur's legal framework for human rights protection is the Protocol of Asunción on the Commitment to Promoting and Protecting Human Rights in

Mercosur, signed in 20 June 2005. The Protocol links human rights and integration process and envisages a sanction mechanism for serious and systematic violations of human rights by member states (Article 1, 3, 4). There is also a draft Charter of Fundamental Rights in Mercosur (Giupponi, 2017, p.337). In addition, it is important to note that Mercosur established a sanction mechanism against non-democratic interventions in member states in 1998 and did not lag behind the EU in this regard, as it established a similar mechanism in 1997 (Malamud, 2020, p.7; the Protocols of Ushuaia I and II). Additionally, at transnational level, human rights are dealt by temporary committees in Parlasur (Malamud and Dri, 2013, p.230). Parlasur may also monitor Mercosur organs by preparing annual reports on human rights (Malamud and Dri, 2013, p.231). These functions of Parlasur reminds European Parliament's works in the area of human rights, as it was seen in the previous chapter. In terms of human rights' place in Mercosur jurisprudence, however, it does not seem possible that they are treated as part of an overarching legal order (Franca-Filho, Lixinski, Giupponi, 2014, p.820). In this respect, the EU's fundamental rights protection through its judicial organ, the CJEU, which has been at place since its early years, is not in effect in Mercosur. The lack of the opportunity of direct judicial application for individuals is one of the challenges for human rights protection in Mercosur according to Giupponi (2017, p.395-96). Given the CJEU's logic behind its fundamental rights protection, which aimed to protect the Community law's position *vis-a-vis* member states- and then the ECtHR- to secure integration as well as intended to preclude a legitimacy question, as it was seen in the previous chapter, it is hard to contend that Mercosur would follow a similar path. The path that the CJEU and EU law followed towards human rights protection included principles like direct effect and primacy of EU law and these principles have been determinant on how the CJEU dealt human rights issue. On the other hand, while the legal order of Mercosur is considered as autonomous by Guiponi (2017, p.80), she concludes that the existence of primacy and direct effect principles are not undisputable in this legal order (p.397).

Even though there are legal instruments with regard to human rights in Mercosur as well as in the Central American Integration System (SICA) and the Andean Community of Nations (CAN), Franca-Filho, Lixinski and Giupponi, qualify

them as "embryonic" (2014, p.817). They identify some common characteristics with regard to these organization's human rights mechanisms (p.817-18). First of all, the impact of the EU's integration model in terms of legal and institutional matters and fundamental rights protection are among the common characteristics of these systems(p.817-18). Additionally, they adjusted their economic perspective by taking into account human rights issues and the protection of human rights addressed in Presidential Summits as integration organs (p.817-18). However, relevant legal instruments are mostly not binding (p.817-18). There are also bodies with competences in the realm of human rights, albeit not effective (p.817-18). Lastly, a dialogue can be observed between domestic courts and judicial organs of these organizations (p.817-18). Naturally, though, these organizations all have their own peculiar way of integration (p.818).

In terms of integration systems' connection with human rights protection, Garcia subsumes models as "incorporation model", which requires being party to external human rights systems for membership, and "leverage model", which means that there is "judicial interpenetration" of integration and human rights protection systems (Garcia, 2003, p.1). According to Garcia, "the existing relationship between trade and human rights in the Americas follows the linkage model" and human rights are dealt with under the head of the linkage between trade and democracy (p.2). Although being a member of the Organization of American States (OAS) and being a party to the Inter American Convention on Human Rights are not preconditions for Mercosur membership, there is a "de facto link between Mercosur membership and effective participation in the OAS system" (Garcia, 2003, p.14). Garcia maintains that Paraguay's political conjuncture and the appetite of Mercosur for the EU's partnership are important components of trade and human rights/democracy exchange in Mercosur (2003, p.13).

Hoffmann addresses Mercosur's distinct human rights regime that goes parallel to Organization for American States' and explains governance transfer in the area of human rights by Mercosur under three head (2015). Civil society organizations' activism (as the main driver), which is supported by the "left turn" governments; Brazil's foreign policy that promotes democracy and human rights while defending

non-intervention and sovereignty; and, legal scholar's network acting as an epistemic community that support regional integration, and Mercosur's mechanism of dispute settlement and the regional human rights system were the driving forces behind this transfer (Hoffmann, 2015). According to Hoffmann, human rights "norms and instruments has not been an imposition of external actors, but rather provided by epistemic communities" (2015, p.13) From this perspective, Mercosur's human rights regime has developed as a response to endogenous forces and the EU influence is absent. Nonetheless, 1995 Interregional Cooperation Framework Agreement between the EU and Mercosur covered democracy and human rights as basis for their cooperation (Preamble and Article 1). A new 2019 political agreement on trade between the EU and Mercosur also covers human rights concerns (European Commission, 28 June 2019, EU and Mercosur reach agreement on trade). Actually, this is part of the EU's general policy in its trade agreements because of the treaty provisions regarding its external action (TEU, Article 21(1); TFEU, Article 207(1)). In particular, human rights have been covered in the EU's free trade agreements with Latin American countries under the head of political cooperation, despite the criticisms on the ground that it is mere rhetoric (Franca-Filho, Lixinski and Giupponi, 2014, p.815). Still, it seems hard to omit the EU element as at least one of the shapers of Mercosur's human rights approach while it is also not possible to assert that Mercosur's human rights system is a copy or resembling of the EU's.

On the EU influence, Franca-Filho, Lixinski and Giupponi argue "[e]xternal actors like the EU have been a driving force behind the insertion of human rights commitments" (Franca-Filho, Lixinski and Giupponi, 2014, p.822). If the EU's "free trade narrative" or its noble causes to advance human rights have been behind this fact, they continue, requires further research (p.823). This question is also relevant for the EU's internal human rights approach, which will be discussed in the next chapter.

Before concluding this section, it should clearly be expressed that the most outstanding features of the current EU human rights system, which are a binding Charter of Fundamental Rights and being a party to the ECHR, are absent in Mercosur. Although a charter was drafted in Mercosur, there is no binding document in the form of bill of rights that provides a guarantee for people against community acts. Similarly,

there is no formal connection between Inter American Court of Human Rights and Mercosur. Therefore, Mercosur is not under a direct international human rights obligation for which it can be held accountable and obligations of this kind are only derived from member states' international commitments. Nevertheless, especially where the factors other than the EU influence play a role, it can be observed that there are some unavoidable consequences of integrations like Mercosur, as it will be addressed below. These consequences are mainly gathered around free movement regime and regional citizenship subjects.

In the following, I will continue to examine Mercosur's human rights dimension with a view to explore the economic integration and human rights link by addressing the subjects of free movement regime and regional citizenship in Mercosur.

### 3.5.1. Free Movement Regime, Regional Citizenship and Human Rights in Mercosur

Free movement of nationals of member states within other member states and entitlement of regional citizenship represent important elements of economic integration, which also have implications for human rights. In fact, there is an Action Plan for a Mercosur Citizenship Statute (Common Market Council , 2010, CMC Dec.64/10), which includes rights and principles, such as civil, social, cultural and economic rights and freedoms, equality in the access to work, health and education, consumer protection along with free movement of peoples (Hoffmann, 2015, p.4-5). Moreover, there is a "Citizenship and Human Rights Committee" in Parlasur (Parlasur, n.d., Citizenship and Human Rights). Therefore, it is relevant to evaluate Mercosur's approach to this issue.

It is fair to say that economic integration process and free movement regime are closely linked and they have the potential to effect and feed each other. In Mercosur, free movement of persons had been an underdeveloped element of integration (Vervaele, 2005, p.398). While there was achievements with regard to customs union and the common market despite the date 2006 for completion of customs union exceeded, the free movement of persons and the principles concerning Mercosur citizenship was not sufficiently developed (Vervaele, 2005, p.408-9), as it

is the case in "recognition of general principles of Mercosur law or references to human rights" (Pierini, 1998 cited in Vervaele, 2005, p.408). On the other hand, according to Giupponi, despite Mercosur's founding treaty's provision that sees individuals as factors of production (the Treaty of Asuncion, Article 1), free movement of individuals, migrant's rights and citizenship issues have gradually gained an importance in Mercosur's legal and political framework, shifting its focus from economic integration to the issues like human rights of migrant workers and Mercosur citizenship (Giupponi, 2011, p.114 *et seq.*). In this context, Mercosur's legal framework included several rights for migrant workers and their families, such as non-discrimination principle for nationals of other Mercosur member states and the right to family reunification (, p.114 *et seq.*).

With regard to the EU's influence on Mercosur's free movement regime for regional migrants, Brumat and Acosta argue that it has been rather limited, questioning the approaches to the subject by the accounts of diffusion perspective (2019). They split Mercosur's free movement policies for migrants into three generations (Brumat and Acosta, 2019). The first generation of policies (1991-2001) saw the migrants as a factor of production within the framework of common market and they were formed mostly by endogenous determinants such as trade union's pressure and dealt with the issue not only from economic but also socio-political perspective (Brumat and Acosta, 2019). The EU's influence, on the other hand, was relevant so far as its economic integration model was applicable to Mercosur in these policies while second generation of policies (2002-2016) were almost entirely free from EU influence and were shaped by the domestic politics in the member states that leaded to add a human dimension to the issue (Brumat and Acosta, 2019). Lastly, the possible third generation of these policies (2016-present) seems to have a more restrictive approach to the issue, conditioned by domestic politics despite the similarities with the EU policies (Brumat and Acosta, 2019). Therefore, the study indicates that there has been little exchange with European experience, at least in the field of free movement of individuals within member states.

In a similar vein, it is argued that the EU's free movement regime for individuals and Mercosur's system in this field are rather different (Cernadas, 2013,

p.4). While the EU has advanced regulations, it is also seen as a negative example in some ways by Mercosur countries (p.4). Grugel, examining the EU's effect on Mercosur's social citizenship perspective, puts forward that the EU model in this area is unlikely to be adopted by Mercosur as long as civil society is not included in the agenda (2007). Still, the social and labour matters and regional citizenship are interrelated in Mercosur (Giupponi, 2017, p.392). In this vein, the Social and Labour Declaration is referred as a crucial document within "social dimension" of Mercosur integration (Giupponi, 2017, p.367).

The content of the Declaration, with non-discriminatory provisions regarding employment (Giupponi, 2017, p.370), displays a partial resemblance to the EU's path in the field of human rights, which was explored in the previous chapter. Therefore, non-discrimination rules with respect to the free movement regime in Mercosur, i.e. albeit immature, can be read as an indication of a route that goes parallel to the EU track. Even though the present position and the destination of Mercosur in terms of human rights is rather different from the EU's, similarities between the paths that they has gone through can signify how economic integration and human rights interact with each other. In this regard, Grugel argues that changes that come with economic integration should be balanced with a social agenda if such a project is desired to be owned by the population on which it has a considerable impact (2005). Drawing from Marshall's "social citizenship" as a phenomenon developed in the 20$^{th}$ century (1973), he addresses European road and maintains that the EU's citizenship perspective, which was closely linked with welfare and development, eased the integration-driven transitions (2005, p.1062). In this conjunction, another similarity between the EU and Mercosur, in terms of the link of economic integration and human rights, can be observed. According to Giupponi, Mercosur's human rights progress is closely related with the relatively recent understanding of development in non-economic terms, in addition to economic dimension of it (Giupponi, 2017).

The entitlement of certain rights is a reflection of the polity-population relationship and the rights granted to Mercosur citizens by documents like the Declaration create such a link. Therefore, rights are important to create a bound -both formal and informal, i.e. in the framework of law or sense of belonging- between the

integration project and population for carrying integration further. In this sense, the importance of social and economic rights can be detected as vital elements of an economic integration. This logic is, of course, also valid in terms of political rights, however, the palpable impact of integration on people's lives is most probably in economic and social realms. However, Mercosur citizenship is not limited with economic and social considerations; it also has a political content. An important aspect of Mercosur citizenship is the existence of Parlasur (Giupponi, 2017, p.391). Citizens of Mercosur Member States have some participatory rights within the parliamentary framework of Mercosur integration. Notably, it is envisaged that citizens can participate in Parlasur elections as well as they have the right to submit a petition to Parlasur (Giupponi, 2017; Parlasur, n.d., History; Parlasur, n.d., Petitions).

In spite of all that, the criticism that the ignorance of relevance of international human rights law in economic integration jurisprudence and the lack of provisions regarding democracy or human rights in free trade agreements with partners other than the US and the EU, which mirrors Mercosur's reluctance to deal with human rights issues (Franca-Filho, Lixinski and Giupponi, 2014, p.821-22), might be seen as indicators of the low possibility of further development in Mercosur in the realm of human rights without the effect of external factors in the process. Among them, the EU has an important place and thus, its influence on Mercosur's human rights approach has the potential to continue to be covered in literature in the years to come. Still, given the fact that Mercosur's initial legal framework was centred on economic integration (Giupponi, 2017, p.361), despite the existence of a political dimension, it is significant that Mercosur has developed a human rights system however flawed and inadequate. Although Mercosur did not aim at these developments at the outset, as an integration project, it has not been exempted from change to which "all political projects, are subject" (Grugel, 2005, p.1072-73). This is quite telling concerning the channels through which human rights can go in a regional organisation heavily concerned with economy in addition to its political aspirations.

### 3.5.2. The Relationship between Economic Integration and Human Rights: Insights from Literature Review

The review of the literature on Mercosur and the EU interaction and Mercosur's integration and human rights system mainly reveals the significance of the EU as a model that influence Mercosur in many aspects. More importantly, however, there are two conclusions that will enlighten the insights of this literature review. First, there are fundamental differences between the two regions, especially in legal terms, which is helpful to understand the EU's path by making the components of the process more explicit. Second, there are some common patterns in the way that the human rights issue relates with economic integration, both in general and in specific regional contexts. This relationship is important, because it gives the hints of the effects of economic integration on the rights issue in the EU. The details of these arguments will be discussed in the following chapter. Nonetheless, the highlights of the literature review should be specified briefly. Accordingly, the insights that can be drawn from the literature review on Mercosur are as follows:

1. Many of the analyses in the literature with respect to Mercosur's integration demonstrate that the EU's integration model constitutes an influential script and institutional settings of regional organisations can be determinant concerning the route of their integration process. Strong regional institutions – especially with supranational competences- are able to function in a way that can affect the route of integration. Particularly, a strong judicial mechanism has the potential to create changes in the area of individual rights protection. It can also be argued that institutional design is important to develop an institutionalised policy area, as in the case of human rights, in a regional organisation. However, intergovernmental character of Mercosur integration, which centralise all regional initiatives, does not allow the regional institutions to act as strong actors in Mercosur, as they do in the EU. This institutional difference between the EU and Mercosur is also a determinant factor on the dissimilarity between their legal and administrative orders since neither a case-law nor administrative initiatives can adequately develop to have a meaningful

effect on integration process. Consequently, human rights protection remains to be dependent on government initiatives.

2. With respect to legal framework, a community law can be seen as another crucial factor for consolidating integration. This point can be drawn from the studies that refer to EU law in the face of Mercosur. The principles envisaged in legislative documents and developed by case-law, such as the principles of direct effect, primacy or subsidiarity as in EU law- also have the potential to have an impact on rights protection, directly or indirectly. Given the important place of these principles in EU law, the absence of them in Mercosur stresses the decisive role of them in the development of the EU's human rights approach. The current human rights regime in the EU, with a Charter of Fundamental Rights and a formal link with ECHR system, is a major difference between the EU and Mercosur and this kind of regime is considered as unlikely in Mercosur.
3. When we look at the first recognised and the most advanced rights within Mercosur, we see that they emerged in economy related areas. For instance, to create a free movement regime is basically driven by economic considerations, but such a regime brings along labour related issues and consequently, labour rights come to the fore. Similarly, citizenship rights granted by regional organisations, despite their political character, are the consequence of an economic unity -and in particular, free movement issues in the first place. It must also be reiterated that the first rights protected in the EU were economic integration related and they mainly sought to prohibit discriminating on the grounds of sex and nationality in employment and occupation. A similar observation can be made with regard to Mercosur. The most prominent developments concerning human rights in Mercosur connect to regional citizenship and labour rights.
4. The arguments with regard to the internal factors' effect on human rights related developments in Mercosur, as in the arguments of Brumat and Acosta with regard to free movement regime of Mercosur that attribute importance to trade union's efforts and domestic politics (Brumat, and Acosta, 2019) or

Hoffmann's argument that highlights civil society activism, national politics and epistemic communities in Mercosur's human rights approach's development (Hoffmann, 2015), can be read as natural consequences of economic integration. Once it is set, economic integration triggers a set of responses. This claim can also be made in relation with the debates in the section on economic integration and human rights link if civil society/civil society organisations, for instance, are part of such a response. That is, if economic liberalisation that comes with an economic integration project is not balanced with a social dimension, it is likely to cause a social unrest. Therefore, it can be maintained that a rights perspective is needed to be adopted to keep integration project under control and base it on a legitimate ground. Universal recognition of sustainable development approach, which sees non-economic issues as important as economic ones, is supportive of this argument, too.

5. A striking feature of an integration project is the existence or non-existence of a "community" perspective, which not only concerns with economic benefits of free trade but also dwells on political dimension of integration. Political integration is important in order to realise policy goals, including human rights protection (Giupponi, 2017, p.41). Indeed, common goals of member states require a legal and institutional framework beyond economic regulations for taking a joint action in the areas like human rights. This perspective also makes it possible to define regional citizenship rights beyond economic integration terms and to see them as a means of furthering political integration. Political integration, in turn, makes it easier to realise economic policy goals, too. The arguments around social citizenship support this approach to the relationship between economic and political integration. Balancing economic integration with social citizenship, and thus securing it, has implications for both economic and political dimensions of a regional integration. To sum up, different dimensions of integration support each other.

In the following chapter, insights of the literature review will be discussed in more detail in combination with the historical developments with regard to the EU's

human rights system with an end to understand the relationship between economic integration and human rights in the EU.

# CHAPTER 4

## HUMAN RIGHTS OR MARKET VALUES MATTER THE MOST IN THE EUOPEAN UNION?

While the previous chapter provided a basis to understand the effect of the economic function of a regional integration scheme on its human rights perspective, the rest of the thesis will discover this relationship in the EU. Grounding on the arguments and findings of previous chapters, this chapter intends to answer the research question of this thesis: has the EU's economic integration influenced the development of its human rights approach? It is argued here that the EU's economic integration logic have had a formative role on its human rights approach for decades. Before coming to this conclusion, however, this chapter turns to the insights of the literature review on Mercosur's integration and the development of its human rights approach and argues these insights in the context of the EU. Based on the differences and similarities of these two cases, it will be argued that legal and institutional frameworks are determinant factors for the development of human rights approaches of regional organisations; that there are certain entering points for social rights protection, in addition to economic rights, in regional integration projects with an economic dimension; and that economic and political aspects of integration are important for one another, as the interaction between them may create some unintended consequences. In the light of these arguments, the chapter will end with the discussion on the EU's view towards human rights through its lenses of economic integration.

## 4.1. Introduction

As it was explored in the previous chapter, there is a close link between economic integration and human rights. This link alone gives a hint concerning the effect of the economic dimension of the EU integration on the development of its human rights approach. However, the history of the development of the EU's human rights approach is also important to understand where economic integration locates in the road. The historical accounts show that the EU's human rights path has always been contingent upon other developments, such as EU law-national laws contestation or concerns for the legitimacy of the EU polity, which have had an effect on the EU's integration process. When it is taken into consideration that judicial competition and addressing the legitimacy issue mainly aimed at guarding the integration and economy has been an important dimension of it, the formative role of economic integration reveals. Also, the fact that the jurisprudence of the CJEU has mainly been constructed upon litigations that have been raised in the context of economic integration, along with the fact that the CJEU jurisprudence has played a pivotal role in terms of human rights, demonstrates the important role of economic integration perspective for human rights protection. While these supportive contentions do not seem directly relevant to the argument that the EU's approach towards human rights is considerably influenced by an economic integration logic, the aim of this chapter is to address this connection. Therefore, in the following sections, I will dwell on connecting the elements from previous chapters that supports each other in contending that the EU's human rights approach has been influenced by its economic integration logic and has developed in a responsive manner to this logic.

Accordingly, main arguments of this chapter are as follows:

Human rights system in the EU has mainly developed as a by-product of other developments. These developments might connect to the economic integration logic of the EU in several ways. Moreover, some developments in this area are directly related with the way in which the EU approaches economic integration, as in the social and economic rights. In the light of these, it can be maintained that economic integration of the EU has effected its human rights approach in three ways: first, to preserve the gains of integration the strength of the EU institutions and EU law have

played important roles and from the early years of integration, EU law has tried to be protected *vis-à-vis* member states by the EU institutions, primarily by the CJEU. Gradually, this attitude regarding EU law attained a more institutionalised framework and policies of the EU and case-law of the CJEU with respect to human rights protection were codified in legislative documents. Similarly, other institutions and institutional design of the EU have been operative in integration process in general and in the development of the EU's human rights approach in particular. As economic integration is an important column of the EU integration, it has inevitably effected the rationale that has guided the process. Second, economic liberalisation inherently brought along not only economic rights but also the issue of social dimension of integration and corollary to this, social rights came into the agenda. Third, there is a multidirectional flow among all dimensions of integration and different dimensions has the potential to reinforce each other. For instance, to further economic integration, certain degree of political integration is required as well as social agenda that comes with economic integration may facilitate and accelerate political integration process. This kind of interaction between economic and political integration can be observed in the relationship among free movement regime, citizenship rights, fundamental rights protection, identity politics and legitimacy of integration process. In this vein, as part of political dimension of integration, citizenship rights can be seen as extension of market freedoms, albeit widening their material scope, and in this sense, their development is closely linked with economic integration.

Despite the decisive role of economic integration concerning human rights approach of the EU, my argument is not that ideas, norms and identity do not matter in European regionalism and in its human rights regime, as it is argued from social constructivist perspective. There is no doubt that especially after the distressing experiences of the World War II, Europe was born out of her ashes through certain ideals and values like human rights, democracy and rule of law while aiming to achieve peace and prosperity in the continent. Moreover, in the post-war international environment, clinging onto human rights was a source of legitimacy for any polity (Williams, 2004, p.129-137). However, after setting aside the ambitious political agenda of the EPC, no explicit human rights provision or competence was envisaged

in the Treaty of Rome and initially, the EEC did not have a coherent human rights agenda, as argued in Chapter 2. In addition to its strong political character, the Treaty of Rome had a prominent economic tone. That is why the EU's changing attitude towards human rights requires unpacking not only political integration process but also the issue of economic integration and human rights interaction for a better understanding with regard to the EU path.

Lastly, it is not argued here that to what extent the protection of human rights has been realised by the EU. Rather, it is discussed that to what extent economic integration logic effected the development process of human rights approach of the EU, which encompasses legislative documents, case-law and politics of the Union. That is, it is asked in this chapter how the EU's economic integration influenced its way of handling the human rights issue, not whether the human rights system of the EU developed because of its economic integration or not.

In the following sections, I will employ the insights of the literature review to reflect upon the EU's human rights road. Since the literature review suggests that law and institutions of a regional integration project are determinant factors in terms of human rights protection, that there are certain entering points for human rights in regional integration projects with a strong economic flavour and that political integration plays an important role for economic integration in such regional integration projects, I will address their relevance in the EU context, respectively. At the end of the chapter, I will conclude with the argument that the economic integration logic of the EU has had an important effect on the way it approaches to human rights.

### 4.2. Utilising the Insights of Literature Review

The insights of the literature review can be discussed under three headings in parallel to the main points addressed above. The first is the role of law and institutional design, the second is the entering points for human rights and the third is the interaction between political and economic integration of regional integration projects.

### 4.2.1. The Role of Community Law and Institutional Design

As the literature review suggests, exploring how the EU model of integration helped forming other regional integration experiences, as in the case of Mercosur, allows one to appreciate the effect of law and institutions of this integration model, which contributed to shape the human rights protection model of the EU, as it did in other areas. Therefore, such an inquiry reveals the EU's distinctiveness in terms of human rights issues. It is also telling with respect to the evolution of the EU's human rights perspective. Especially differences between the EU's and Mercosur's human rights paths indicates some potential consequences of certain legal and institutional features of regional integration.

First of all, the review of the literature on Mercosur and the EU interaction and Mercosur's integration and human rights system has demonstrated that the EU's integration model constitutes an influential script. However, it has also showed that Mercosur's law and institutional design is not a copy of the EU's and Mercosur has adopted some features of the EU model of integration in a selective manner. Because of Mercosur's intergovernmental integration model, it is not possible for its regional institutions to act as strong actors in Mercosur, as they do in the EU. This institutional difference between the EU and Mercosur allows neither a case-law nor administrative initiatives that can have a meaningful effect on integration process. Therefore, many aspects of Mercosur integration, including human rights, differ from the EU significantly despite its influence. What follows from this is that legal and institutional frameworks of regional organisations can be determinant on the route of their integration process. Strong regional institutions -especially with supranational competences- are able to function in a way that can affect the route of integration. Particularly, a strong judicial mechanism has the potential to create changes in the area of individual rights protection. This can be drawn from the CJEU's important role, which has been discussed in Chapter 2, and from the lack of a similar institution equivalent to the CJEU which is capable to yield results for a strong rights protection in Mercosur, which has been explored in Chapter 3. It can also be argued that institutional design is important to develop an institutionalised policy area, as in the

case of human rights, in a regional economic and political organisation. While it is hard for an informal regionalism to be institutionalised (Söderbaum and Sbragia, 2010, p.574), the EU has been supported by formal structures to be able to fortify its integration.

With respect to legal framework, a community law can be seen as another crucial factor for consolidating integration. This point can be drawn from the studies that refer to EU law in the face of Mercosur. The principles envisaged in primary and secondary law and developed by case-law, such as the principles of direct effect, primacy or subsidiarity, have the potential to have an impact on rights protection, directly or indirectly. Given the important place of these principles in EU law, the absence of them in Mercosur stresses the decisive role of them in the evolution of the EU's human rights approach. The current human rights regime in the EU, with a Charter of Fundamental Rights and a formal link with ECHR system, is a major difference between the EU and Mercosur.

Actually, the strength of EU law can be seen as a consequence of its institutional design in addition to political wills of member states. Supranational character of EU institutions creates possibilities for developing a considerable case-law and secondary law. Indeed, the lack of strong supranational capacity of regional institutions can cause weakness in terms of human rights protection. Especially the EU's non-judicial/political institutions' limited powers may lead an inactiveness when, for instance, member states violate the fundamental rights, which are among the founding values of the EU (Fabbrini, 2016, p.20). On the peak of the gradual development of EU law, as codified in the Treaty of Lisbon, there are

> legislative opportunities and a consolidated primary law framework for the protection of fundamental rights […that] enables political and jurisdictional institutions to broaden the scope of Union fundamental rights intervention through a wide range of techniques. (Muir, 2014, p.244).

Within this context, the importance of direct effect principle in the development of the EU's human rights system, as it has been addressed before, makes explicit that the lack of the principle in Mercosur law can be one of the reasons of Mercosur's underdeveloped human rights dimension when compared to the EU. Similarly, primacy of EU law has been decisive in the EU's human rights route, which

is absent in Mercosur. While direct effect enabled the CJEU to develop a considerable case-law based on litigations, primacy guaranteed the effective implementation of EU law. By depending on the legitimisation function of minimum protection provided for human rights, the CJEU and the EU strengthen its law and integration (See above, 2.1.1.1. The Court of Justice of the EU). The principle of subsidiarity, on the other hand, not only restricted the EU competence but also extended it (Shelton, 2003, p.135-36). Therefore, it made possible to create more EU action in the area of human rights.

In parallel with these accounts, it can be argued that human rights protection in the EU has been based on "the integration of existing legal obligations rather than the creation of new or autonomous obligations. In this respect it can be said to have emerged through the roots of the EU legal order, informing and shaping it." (Reid, 2015, p.22). Accordingly, the EU's human rights protection approach developed in a "reactive" manner and "it arose as a consequence of the need to secure the […] EU legal order" (p.22). This argument is illustrative for the importance of the nature of EU law in its integration process and its human rights approach's evolution.

What follows from above is that common goals of member states require a robust legal and institutional framework for taking a joint action and hereby realising policies that are related with economic, social and political aspects of integration. In the EU, supranational character of integration has facilitated to act collectively in all these areas (See above, 2.1.1. Towards a Human Rights Discourse: The Role of the EU Institutions). Before moving to the relationship among different dimensions of integration, the second point derived from the insights of the literature review, which is that there are certain entering points for human rights in regional integration schemes with a strong economic dimension, will be evaluated in the EU context.

### 4.2.2. Entering points for human rights in regional integration schemes with a strong economic dimension: economic and social rights

There have been conditions unique to the EU path that made it possible to construct a human rights regime (See, Chapter 2) but it can also be observed that there are certain entering points for dealing with human rights questions in any economic

integration model as there is an inherent relationship between economic liberalisation and the rights issue (See, Chapter 3). Therefore, every economic integration scheme has to address this question whether in favour of rights or not.[29] Since increasing competition with trade liberalisation and economic integration create "pressures to resist adjustment and/or demand for compensatory measures on the part of countries and regions most severely hit by the asymmetric distribution of net benefits" (Padoan, 2013, p.62-63), and this kind of asymmetry possibly occurs in each country involved in such a process, it can be regarded as inevitable for regional integration projects like the EU and Mercosur to address these issues. Likewise, issues like labour rights are important in the context of the WTO and in linking human rights and international trade (Reid, 2015, p.17).

Compatible with this argument, the first recognised and the most advanced rights within regional integration projects that has a strong economic dimension emerge in economy related areas, as in the case of the free movement regime and labour rights relationship. It was explored in the previous chapter that most of the prominent developments concerning human rights in Mercosur connect to free movement regime, regional citizenship and labour rights. Moreover, in the context of Mercosur, Giupponi maintains that the social dimension of Latin American integrations in general and Mercosur in particular, is the most significant ground for the development of human rights (2017). The historical account on the EU's human rights journey also indicates to a similar point. The provisions of the Treaty of Rome on non-discrimination on the grounds of sex and nationality (Article 48 and 119) and the CJEU's extensive case-law on equal treatment (Defeis, 2001, p.313) that are in close relation with market freedoms are no coincidence. Non-discrimination provisions were related with economic life that came into existence with the creation of a common market established upon the free movement of goods, people, services and capital. Therefore, it can be argued that "the development of labour standards in

[29] The consequence of that choice, though, would differ significantly. For instance, Reid argues that the EU can serve as an example for the WTO with respect to balancing economic liberalisation with non-economic interests like human rights, in the light of proportionality and sustainable development concepts (Reid, 2015).

the EU occurred originally as a means of removing competitive distortions rather than as a 'rights' issue and has only relatively recently grown into a 'rights' issue." (Reid, p.17, supra note 34).

Likewise, although EU citizenship was formally introduced with Maastricht Treaty, initial version of regional citizenship already existed as originally stemmed from free movement regime. While it is significant that Maastricht Treaty envisaged rights in political nature such as "the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides" (Article 8b) it also turned a previous free movement provision into a citizenship right by stating that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States"(Article 8a). That is to say, EU citizenship started with common market and subsequently was supported by political citizenship rights. What is more, in the Charter of Fundamental Rights, market freedoms were enounced among the rights of EU citizens. For instance, the Charter entitles every Union citizen with the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State (Article 15/2) while reaffirming the abovementioned Maastricht provision under the "Citizens' Rights" title (Article 45/1).

It was also concluded in the previous chapter that there could be natural social/societal responses to economic integration. In this context, it was argued that if an economic liberalisation project is not balanced –or at least is tried to be balanced- with a social dimension, it is likely to cause a discontent and controversy in society (See above, 3.2.2. Regulating the Global). One of the insights drawn from the literature review is the importance of internal factors, such as civil society advocacy (See, Brumat and Acosta, 2019; Hoffmann, 2015).This insight supports the view that economic integration and rights protection is closely linked, because it implies that, in Mercosur for instance, free movement regime would be an entering point for rights protection even if the EU influence were absent. Therefore, it can be maintained that a rights perspective is needed to be adopted to keep integration project under control and base it on a legitimate ground. Unless the link between economic liberalisation and human rights is addressed properly by the relevant authorities it is likely to create a tension. Universal recognition of sustainable development approach (Reid, 2015,

p.309), which sees social and environmental issues as important as economic ones, such as poverty, gender equality, climate change[30], can be seen as a supporting element for this argument. The shift from economy-oriented approach towards development to a more balanced understanding of it with a focus on human rights mainly emerged as a result of post-Cold War global conditions in 1990s (Hamm, 2001). To balance adverse effects of economic globalisation on social standards, it was argued that "a stronger consideration of human rights" was needed (Hamm, 2001, p.1007). On the other hand, while social integration started to be debated mainly towards 1990s in the EU, it had already addressed some social issues before this development approach globally prevailed. As a consequence of free movement regime, social regulations with regard to employment and occupation were put in place. Nevertheless, the EU's approach to social dimension of integration is not exempt from controversy.

With respect to social dimension of economic integration, van der Vleuten argues that "[m]arket-integration regimes face negative externalities and look for social and gender governance as side payment and sources of legitimacy, especially in times of popular discontent" and, presumably as a result of such a narrow understanding of social and gender issues, "gender governance is limited to employment and free movement issues" (2016, p.421). She defines four social and gender governance regimes: individual rights regime, market-led regulatory regime, state-led developmental regime and state-led conservative regime (van der Vleuten, 2016). According to this categorisation, Mercosur and the EU are both "market-integration regimes" and they both put more emphasis on market freedoms in the face of social and labour rights (van der Vleuten, 2016, p.410-11). For the EU, this emphasis is widely reflected upon in the literature on its approach to human rights, as it will be exemplified below.

What follows from the foregoing discussions is that the social dimension is a clear entering point for human rights perspective in regional integration projects that attributes a central role to economic dimension of such projects. Social rights, along

[30] See for instance, https://www.un.org/ecosoc/en/sustainable-development; https://ec.europa.eu/info/strategy/international-strategies/sustainable-development-goals/eu-approach-sustainable-development_en#documents .

with economic rights, in the context of regional (economic) integration contribute to develop a human rights approach.

However, as Padoan argues, "without cohesion, political support for a regional agreement is likely to fail. Consensus to the regional agreement, […], will then depend on the degree of cohesion among its members" (2013, p.62-63).

In line with this argument, it can be contended that paying attention to political dimension of a regional integration project, which has a prominent economic dimension, is highly possible. This reading requires to examine the interaction between political integration and economic integration in a regional organisation, so that we can detect the implications of the development of the EU's human rights approach in relation with its economic integration process.

### 4.2.3. The interaction between political integration and economic integration

After the failure of the European Defence Community in 1954, political integration geared down in the EEC and the focus was –at least relatively- shifted to economic dimension of integration, despite the political weight of the project (de Burca, 2011; Scharpf, 2010, p.212). According to de Burca, when it is compared to the framework set in the EPC, political goals of the EEC were less ambitious because of a purposeful decision to take cautious steps for setting the integration forward (2011). Consequently, human rights matters excluded from the EEC's agenda (de Burca, 2011). Thus, subsequent developments in the direction of deeper and further integration require an attentive reading to be able to interpret their implications for human rights approach of the EU.

As explored in the previous chapter, "community" perspective is an important element of a regional integration scheme that not only gives weight to economic integration but also concerns with political dimension of integration. "[A] political process with an economic, social and cultural content, underpinning a political integration […] is fundamental to consolidate the gains and economic, social and cultural goals" (Palma, 1999, cited in Giupponi, 2017, p.33). This line of argument

suggests that there is a multidirectional flow among all dimensions of integration and they are inclined to fortify each other.[31]

In this vein, an example is the importance of political integration in realizing common goals of member states (Giupponi, 2017, p.41). With a strong legal and institutional framework, it is possible to set goals beyond economic integration. For instance, regional citizenship rights can be defined in non-economic terms and by doing so, they can help furthering political integration. Political integration, in turn, makes it easier to realise economic policy goals. The arguments around social citizenship (Grugel, 2005, p.1062) support this approach to the relationship between economic and political integration. Balancing economic integration with social citizenship, and thus securing it, has implications for both economic and political dimensions of a regional integration, due to the multidirectional flow among all dimensions of integration. In this regard, it should be reiterated that economic integration might help to promote social and political dimensions of integration. Even though political integration proceeds with an economic undertone, this kind of integration is likely to fortify and increase achievements regarding social issues or rights protection.

Again, as a result of the mutually feeding relationship among different dimensions of integration, political integration and important events that pushed it further are part of economic integration in the EU since political capacity of the EU make it possible to make efficient decisions in the way of creating a strong regional organisation with economic ambitions. For sure, it is too extreme to assert that the EU's political integration has always served to further its economic integration but one thing seems obvious: the EU's increased political integration level, in general, made it easier to further its economic integration and it became an occasional recourse that the EU turned to when it needed for its economic project. On this basis, it can be argued

[31] With regard to the relationship between political and economic integration, it is argued that one may follow the other. For instance, according to Scharpf, Hayek's foresight regarding the succession of political and economic integration reversed in the EU, i.e. integration started with a common market vision, and following this approach, social policies were formed at national level without disturbing social market economies until the new economic landscape of the 1980s (cited in Scharpf, 2010, p.212-13).

that certain aspects of political integration have been instrumental for economic integration in the EU and human rights related issues can be regarded among them. The debates around social dimension of economic integration support this view.

By the same token, in Latin American context, it is argued that after trade focused integration was consumed, for strengthening integration, political, social and cultural issues came into the agenda (Pulgar, 2001, cited in Giupponi, 2017, p.28-29). From this perspective, it is important for a "collective project" to build a political architecture (Giupponi, 2017, p.33). In terms of the relationship of economic and political integration, it is duly stated that:

> The political dimension of the trade agreements involves certain stages and aims for member states in order to constitute a genuine political union, among which the following stand out: the ability to form a political will in order to carry out integration; the power to make adequate integration policies; and the ability to implement them effectively, so that integration can effectively progress (Ror, 1993, cited in Giupponi, 2017, p.33-34).

Following this logic, the EU's constant emphasis on political issues like human rights can be interpreted as indicating to a will that craves for further and deeper integration, including economic integration, as political integration not only helps to strengthen political dimension but also enables to realise more economic action in the EU. That means economic integration can be considered as one of the reasons of the strength of political integration, which has gradually increased, in the EU.

Likewise, the observation that "construction of a shared identity" went "hand in hand with institutional development and deepening integration" in the EU (Fawcett, 2004, p.442) supports the view that several aspects of integration feeds each other. In this vein, the role of the Charter of Fundamental rights in promoting European identity (Maduro, 2003, p. 269) and thus strengthening the EU polity can be given as an example. Indeed, "fundamental rights are fundamental not only for the individual rights holder but also for the self-understanding of the polity as a whole" (Augenstein, 2013, p.1922).

To conclude, despite the major differences between the EU and Mercosur, especially in terms of their institutional and legal frameworks, the common patterns

with regard to the emergence of a social dimension acknowledging social and labour rights, in addition to economic freedoms and "market friendly rights", reveals the relevance of economic integration to human rights approach of regional integration schemes like the EU and Mercosur, which have a community perspective with political aspirations as well as economic goals. Because of the mutual reinforcement of economic and political dimensions, social agenda that comes with economic integration can be converted into political terms, too, while political integration allows to preserve and uphold the gains of economic integration with its social dimension.

After this discussion with regard to the insights of the literature review, I will argue the important place of the EU's economic integration in the development of its human rights approach in the following section.

### 4.3. Arguing the Relevance of Economic Integration to the Development of the EU's Human Rights Approach: The Road from Rome to Lisbon

As it has been discussed above, 1957 Rome Treaty and initial design of the EEC precluded human rights issues except for limited number of provisions regarding the functioning of the internal market and corollary to this, human rights could only be protected and promoted by institutional initiatives. While the CJEU was an active institution with the capability of direct involvement of rights protection, albeit within the constraints of market regulations, other institutions had less active roles with limited, even *de facto*, competences. With respect to human rights, the Parliament was not strong enough in its first two decades, the Commission had limited devices as an executive body and the Council run late in adopting directives despite its legislative powers (See above, 2.1.1. Towards a Human Rights Discourse: The Role of the EU Institutions). It seems that human rights perspective of the EU started to evolve in the 1970s as its institutions started to show an interest to the issue -interestingly enough, after the cases like *Stauder*, in 1969 that brought along some challenges for the EU law and integration process were concluded with a new approach towards fundamental rights protection. From *Stauder* on, neither the CJEU nor other EU institutions ceased to develop human rights system of the EU. Again, it should be stressed that, because of the provisions of the Treaty of Rome, the protection of the CJEU was limited with

market freedoms' framework and the Council's directives dealt with market freedoms-related non-discrimination issues in this period. On the other hand, the Parliament inclusively dealt with civil, political, social and economic rights whereas the Commission put a special emphasis on social and economic rights (See, Chapter 2). The approach of the EU towards human rights supports the foregoing argument that there are certain entering points for the development of the EU's human rights approach via economic and social rights in regional integration schemes with economic concerns. Except for some documents in political nature such as Joint Declaration of 1977, which aimed at creating a rhetoric (Williams, 2004, p.151), all human rights related activities of the EU were in connection with the issues that surrounded social and economic rights in its early years. The acknowledgement of representative democracy and human rights as constituent parts of being a member of the Community in 1978 European Council of Copenhagen, and its adoption by the Commission as a membership condition for Greece and Turkey (de Witte and Toggenburg, 2004, p.60; Sedelmeier, 2003, p. 10) can also be considered as part of this political discourse. It appears that this period was mainly responsive to internal dynamics although the political implications of a human rights rhetoric in Cold War environment can also be seen as a motivation for the EU.

Nonetheless, in the process leading up to the SEA, the way of a new human rights perspective was paved. After 1973 oil crisis, regulating globalisation came into the agenda of Western Europe and in this regard, the Single European Act was a product of global challenges that the EU-then the EEC- had to addressed (Warlouzet, 2017). Warlouzet argues that in the period from 1973 and 1986, regulation of globalisation was realised with "socially-oriented, neomercantilist, and market-oriented" economic and social policies in the EU (2017). Van Apeldoorn construes the synthesis of these competing approaches in the EU as a reflection of "embedded neo-liberalism" (van Apeldoorn 2001). After 1989, on the other hand, the effects of globalisation became more challenging and neoliberal approach prevailed in the 1990s by also exacerbating the legitimacy problem with a perception of inadequacy in terms of regulation of globalisation (Warlouzet, 2017, p.227 *et seq*.). Despite this neoliberal orientation, Warlouzet remarks, the EU also materialised social policies via *inter alia*

several directives and the inclusion of the Charter of Fundamental Social Rights of Workers (1989) in Maastricht Treaty in 1990s (2017, p.230).

In the context of balancing economic integration with a social dimension, van der Vleuten points out the limits of regional governance with regard to social and gender issues in "market-integration regimes" due to the lack of participatory policy-making and robust supranational institutional structure in addition to the effects of domestic politics on the approaches of national welfare systems towards regional commitments (van der Vleuten, 2016). Because of these restraints, regional social governance remains to be a part of legitimacy search of regional organisations as well as serving as a balance mechanism to bind all parties of an integration regime (van der Vleuten, 2016). Despite its supranational structure, it can be argued that the EU social policy has also been restrained by member state policies and flaws regarding policy-making process. In explaining demand factors of market integration, van der Vleuten indicates the inclination of member states for elimination of negative effects of external environment, side payments that are provided for weaker member states and legitimacy concerns,[32] which have all been relevant for the EU. In this regard, she contends that "the lack of domestic legitimacy against the background of the financial and economic crisis has been a stimulus for the development of social policies in the EU and Mercosur" (van der Vleuten, 2016, p.414). Accordingly, it seems that social dimension of the EU and social rights has been closely linked with economic integration, as in the case of Charter of Fundamental Social Rights of Workers.

On the other hand, global developments have constituted important forces that have shaped the route of the EU's economic integration. The EU focused internal aspects of integration in its first four decades, while it started to shift its focus to global matters especially after Maastricht (de Búrca, 2013, p.9). This can be read in close relation with the changing nature of international environment and globalisation. In this sense, de Burca contends that the EU's internal and external actions has become interrelated issues within a couple of decades partly because of its external action has

[32] In the supply side, the interests of the dominant regional power, non-state advocacy groups and normative international standards are stated as factors that shapes the regional social and gender governance by van der Vleuten (2016).

been perceived by its citizens as its response to globalisation (2013, p.9). What can be drawn from this argument is that the global role of the EU enables it to mitigate the effects of exogenous forces by having a share in these forces.

As a result of its increasing external action with regard to human rights it has even been discussed whether the EU has been a global human rights organisation. In this regard, Besson argues that "the EU has the capacity to become the first of a new kind of global human rights institution" (Besson, 2006, p.343). On the other hand, it is argued by Douglass-Scott that "[t]he EU cannot be constructed as a human rights organisation merely on the back of dimensions of human rights protection necessary to ensure economic integration" (Douglass-Scott, 2011, p.649-50). From this view, with its longstanding market focus, arguing the EU's capability as a human rights organisation seems problematic (Douglass-Scott, 2011; von Bogdandy, 2000). Also, in its renowned opinion, it was stated by the CJEU that "No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field." Although with the Lisbon Treaty the EU was obliged to advance human rights in its external relations (TEU, Article 21/1), the lack of general power to enact rules on human rights is still the case after Lisbon along with the fact that, in essence, the Charter did not create new competences. Under such circumstances, it seems hard to describe the EU as a human rights organisation. Although it is true that the EU "has been a shaper of globalization rather than simply its object" (Sbragia, 2008, p.34) and as a global actor the EU plays a major role in forming the approach to non-economic interests in the face of economic ones (Reid, 2015, p.310), its human rights system is still subjected to some criticisms.

Augenstein, by referring to Philip Alston (1997), states that with globalization, free market has become a value in itself by which the value of human rights are measured according to their concordance with market vision (2013, p.1917). Against this background, Augenstein argues:

> [T]he EU's internal market is not simply a constraining factor in the effective realization of fundamental rights, but provides the very foundation of their autonomous interpretation in the European legal order. In short, the substance of EU fundamental rights derives from a form of economic rationality that is the rationality of the internal market (2013, p.1918).

The idea of regeneration of integration, which started in the process towards the SEA with a focus on economy, continued with the Treaty of Maastricht aiming at full economic and monetary union. On the other side, Maastricht was also important in terms of political integration. It concerned for instance, legitimacy, extension and strengthening of Community action and European citizenship. Maastricht Treaty was groundbreaking in many ways, including human rights. However, the set of circumstances under which Maastricht was developed and the background that had been in the making since the SEA should be noted as these show that the strengthening of the EU's political dimension was closely linked with the changing nature of global order. The EU was not the only regional project that has economic and political aspirations, as it was touched upon before. Whether it was one of the managers of globalisation or not, in contrast to other regional projects such as Mercosur, it adjusted itself according to the effects of increasingly globalised world. As the economic implications of globalisation are significant, the transformation that the EU has experienced should also be read in the light of economic changes.

The EU reacted major economic challenges with a major solution: the SEA. However, this step required to be followed with a balancing step. In fact, political agenda of Maastricht was actually the consequence of the growing beast of market integration (Augenstein, 2013, p.1918). That is, it also addressed the legitimacy problem of a growing polity. Also, as it was discussed before, political integration can be seen as necessary for common policies and joint action in the economic area. To be able to set forward economic integration, at least a certain degree of political integration is required. Political elements of integration that includes human rights along with EU citizenship and identity issues, which enables the EU to tackle its legitimacy problem, are all relevant for securing and advancing integration process with an ambitious economic agenda in the face of pressing global challenges.

In the context of the political and economic integration relationship, it should be stressed that a successful economic integration not only makes it possible to preserve and carry it further but also helps to strengthen political integration. This is because of the fact that it keeps promising to people and ensure their commitment to the project, as the initial promises of European integration did (Judt, 1994; de Burca,

2013, p.8). De Burca's argument with regard to *"raison d'etre"* and legitimacy of the EU reinforces this claim; she argues, "[m]ission legitimacy, along with democratic and output legitimacy, continues to play an important role" in the EU (2013, p.8). That means, to be able to legitimise its existence in the eyes of its population, the EU has to make it clear that why it stands for (de Burca, 2013, p.8). Unlike states, the EU have always had to prove its legitimacy by creating concrete positive results in the lives of Europeans (de Burca, 2013, p.3-4). While the EU's initial aim was to promote peace and prosperity, its current *"raison d'etre"* is not as clear as that and austerity policies following economic crisis made its legitimacy more questionable in the eyes of people who were affected by these policies (de Burca, 2013, p.4). This expectation of EU citizens with regard to the EU's positive effect in their lives, especially in economic terms, and their distrust in the EU to create that kind of effect may be read as an indicator of the importance of economic dimension of integration for the whole project. According to de Burca, younger generations are not as interested as older generations who had war experience in peace securing role of the EU, but they rather are concerned with economic issues (2013, p.8). Actually, while young EU citizens attribute an importance to the normative values of the EU including human rights, and not just economic interests (European Parliament, Flash Eurobarometer: European Youth in 2014, Analytical Synthesis, 28 April 2014, p.5), they also expect more EU action regarding issues like youth unemployment (European Parliament, Eurobarometer Survey: Delivering on Europe Citizens' Views on Current and Future EU Action, May 2018). Williams also states that as "well-being" is still perceived from an economic perspective, the EU's *"raison d'être"* is premised upon this perception (2010, p.152).

In the post-Maastricht process, one of the leading reasons for the employment of human rights was the legitimacy issue that came along with the EU's outgrowing existence (de Búrca, 1996, p.350). While post-Maastricht legitimacy debate dwelled on popular legitimacy, in terms of the EU's normative legitimacy, there was also arguments that challenged market values (1996, p.352). By this token, Greer and Williams maintain that human rights have been related with the legitimacy of EU law and the EU itself as an autonomous polity, in addition to market integration (2009,

p.478). In this context, it should be added that in the post-Cold War process, the possible memberships of Central and Eastern European countries to the EU had been decisive in agenda setting, especially within the context of human rights as one of the values of the EU. Indeed, in the context of eastern enlargement, it can be argued that this process contributed significantly to the development of the EU's internal human rights regime (Iusmen, 2015).

Against this backdrop, the process of strengthening the EU integration had continued for more than a decade after Maastricht. Despite the failure of the Constitutional Treaty in 2004, important reforms realised with the Treaty of Lisbon. In this vein, the binding legal status of the Charter of Fundamental rights and the EU's accession to the ECHR are two significant novelties. The process of strengthening the human rights framework within the EU has also continued after Lisbon (Iusmen, 2015, p.175).

In essence, economy related issues have extended all the way to human rights. Directly or indirectly, economic integration has shaped the way human rights are perceived and dealt with in the EU. Economic, social and political dimensions of integration have interacted and fed each other. Like non-discrimination provisions, which were created in the context of market freedoms at the first place, "have helped extend the scope *ratione materiae* of European citizenship", European citizenship, as Eeckhout (2002) argues, helped "extend the scope *ratione materiae* of EU fundamental rights in general" (cited in Besson, 2006, p.351). Nonetheless, "fundamental rights are still characterised by an economic emphasis and the limits set by" EU law (Besson, 2006, p.351) and human rights in the EU can still be evaded for carrying out the internal market vision in the EU (Williams, 2010, p.152).

Of course, it should also be noted that the extended material scope of fundamental rights makes it possible for European citizens to seek a remedy in case of a breach of their rights by both the EU and Member States (Eeckhout, 2002 cited in Besson, 2006, p.351). However, even the latest Treaty amendments in the field of human rights did not put an end to the discussions with respect to the EU's human rights system. For instance, the incongruity between its internal and external human rights approaches and a solid human rights system addressed to its members are

continuing issues even after Lisbon (de Burca, 2011, p.44). In this sense, another noteworthy line of argument deals with the issue of "the contingency of human rights protection on the promotion of market values" (Augenstein, 2013, p. 1918-19).

I will conclude with discussing this line of argument in more detail in the last section below to argue that the EU's human rights approach is highly dependent on its economic integration logic.

### 4.4. Dependence of human rights on market values in the EU

Today, the EU is one of the most prominent global actors that promotes human rights although it is not a human rights organisation with a general competent to be so. It is a regional organisation, which has achieved a tremendous political and economic integration with also social and cultural aspects and deals with a myriad of issues areas from competition to environment, to name a few. While it has both economic and non-economic goals, they are not always in balance. Several issues that can be deemed as non-economic issues, such as human rights, in spite of their relationship with economy, can be of secondary importance in the face of economic integration rationale of the EU.

Certainly, when the EU is compared with economy-centred organisations like the WTO, it can be said that non-economic interests such as human rights and environmental protection have been enhanced and in this sense, it can be presented as an example for the WTO, which has mainly dwelled on trade liberalisation (Reid, 2015, p.311). However, the inadequacy of the EU's positive integration as regards non-economic issues is also a widely debated issue. In this regard, the EU economic integration's damaging effect on member states' social policies, for instance, has been commonly expressed. Within this vein, Barnard and Deakin indicate the damaging effects of single market rules to national social policies (Barnard and Deakin, 2012) while Scharpf also emphasises the problems of liberalisation and deregulation in the context of economic integration as they have had severely penetrate national socio-economic systems (Scharpf, 2010). It is even argued by Augenstein that pronouncing fundamental rights as one of the general principles of EU law "not only served to pacify Member States' judiciaries but also shielded the unity of the internal market

against the diversity of Europe's national constitutional human rights traditions" (2013, p.1920). Moreover, to maintain that human rights have gained a freestanding value in the EU (Reid, 2015, p.311) is questionable when their reliance upon market values is taken into consideration (Augenstein, 2013, p.1918-19) and as their contingent historical development has demonstrated. Still, of course, it is true that a supranational EU polity, which moved beyond the EEC of the 1957 Rome Treaty, can balance human rights and economic integration since the EU members have a congruity with regard to human rights as also the members of the CoE and as the parties to the ECHR, at least to a certain degree (Reid, 2015, p.309-12). On the other hand, this common dominator does not ensure the recognition of human rights as freestanding values in the EU where they are weighed *vis-a-vis* market freedoms.

In this respect, the cases of *Schmidberger* (Case C-112/00, 2003 ECR I-659), *Omega* (Case C-36/02, 2004, ECR 1-9609), *Viking* (Case C-438/05, 2007, ECR I-10779) and *Laval* (Case C-341/05, 2007, ECR I-11767) have been frequently elaborated on. Their importance for the EU's human rights perspective stems from their dealing with fundamental rights in the face of fundamental freedoms. While *Schmidberger* and *Omega* cases, based on sustainable development approach and in the light of proportionality principle, favoured fundamental freedoms (Reid, 2015, p.78 *et seq.*), determining their weight in the face of fundamental (market) freedoms is a contradictory issue. Although the CJEU's proportionality test weighs and balances the fundamental rights and freedoms of the EU according to the case in hand, this kind of taking of fundamental rights can be construed as demonstrating the market focus of the Union. Especially the criticisms with respect to the CJEU's approach that elevated fundamental freedoms in *Viking* and *Laval* cases stresses the EU's economic focus (See, Barnard and Deakin, 2012; Douglass-Scott, 2011). Barnard and Deakin argue that *Viking* and *Laval* cases manifested the risk of deterioration of national social policies in the EU system, which put an emphasis on market freedoms (2012).

This approach is actually reflected in the Charter of Fundamental Rights since it recognised "the freedom to seek employment, to work, to exercise the right of establishment and to provide service" as one of the fundamental rights (Article, 15). As de Boer argues, market freedoms should not be assumed among fundamental rights

unless they serve to equality of opportunity, and therefore, they cannot be considered as fundamental rights if they safeguard "market access" (de Boer, 2013, p.149; Reid, 2015, p.77). This is because of the acceptance that human rights carry a self-standing value in contrast to market-oriented economic freedoms (de Boer, 2013). However, the value of human rights in the EU considerably relies on the demands of market as a consequence of EU law (Williams, 2010, p.152).

Unlike the primary role played by fundamental freedoms, fundamental rights have had a secondary place in the economic integration process after they entered in EU law (Augenstein, 2013, p.1919). As it was rightfully reminded by Augenstein "it appears no coincidence that the first litigant ever to benefit from the direct effect of [fundamental] rights was not a natural person but a corporate national" (2013, p.1918). The fact that the cases that the CJEU deals with human rights issues have been brought before the Court by corporate litigants explains "the transformation of 'human' into 'fundamental' rights", and notwithstanding the EU's extending competences, which transcends being an internal market, the EU still puts an emphasis on the economic as reflected in *Viking* and *Laval* cases (Douglas-Scott, 2011, p.679). It appears that economic integration continues to be an implicit logic behind the CJEU rulings.

Furthermore, fundamental rights are not clearly determined and consistent in all situations in the EU, even though, this is the case in member states or in any national legal order, too (Augenstein, 2013, p.1922 *et seq*.). Augenstein discusses this problem by drawing from Weiler (1999) and contends that fundamental rights in a polity are interpreted according to "fundamental boundary" of that polity, which indicates common values of a society and, in interaction with fundamental rights, helps to shape the core identity of a polity (2013, p.1922 *et seq*.). Following this argument, Augenstein maintains that the "fundamental boundary" of the EU as a polity is seen as the internal market by the CJEU in the lack of an autonomous constitutional tradition of the EU, as it recourses to the ECHR and constitutional traditions of Member States while searching for a commonality (p.1926). Despite the existence of the cases like *Omega* and *Schmidberger*, which struck the balance between fundamental rights and fundamental freedoms of the EU in favour of rights, the fact is that the CJEU weighs human rights on the scale of internal market as a consequence

of the nature of EU fundamental rights law (Augenstein, 2013, p.1932 *et seq*.) described above. Moreover, it is hard to maintain that these cases changed the approach of the CJEU while dealing with human rights (Williams, 2010, p.133-34). Therefore, the problem is more than seeing market as a value or instrumentalising rights for market; its origin is the nature of EU law (Augenstein, 2013, p.1937-38). According to Augenstein, this challenge can be overcome via "transformation of the internal market as the fundamental boundary of the European polity" and deliberation of the issue of fundamental rights in a political context (2013, p.1938).

While Reid discusses that the EU's proportionality test and sustainable development approach can be a practical solution to the WTO system's problems, as stated by her, this is only a pragmatic solution (2015) rather than grounded mainly on principles and values. However,

> markets foster efficiency, but not social equity or the enjoyment of individual rights for all. Rather than ensure that people are treated with equal concern and respect, markets systematically disadvantage some individuals to achieve the collective benefits of efficiency (Donnelly, 2003, cited in de Boer, 2013, p.149).

Therefore, mechanisms for "greater social inclusion […] to overcome the lack of social development" should be designed in economic integration schemes via for instance, parliaments and other participatory structures and instruments (Giupponi, p.29, supra note 58).

It can also be argued that, albeit the significant positive impacts, the EU's sustainable development approach, which is laid out in Article 3/3 of the TEU[33], inherently sees human rights as part of economic integration since development concept, especially from a historical perspective, has mainly had economic grounds. It is also true that development is a human right[34] and is seen as such under several

[33] "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

[34] See, UN Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4 December 1986.

regional and global frameworks;[35] however, its economic dimension is possibly more significant from the perspectives of many relevant regional and global actors. For this reason, at least one of the implications of this developmental logic is that the human rights approach of the EU has been considerably rooted in economic concerns.

In the light of these arguments, it becomes explicit that the EU human rights system emerged mainly in a reactive manner and "[t]he legitimacy of this development is secured by its reliance upon pre-existing rules and obligations" (Reid, 2015, p.22). That is, "main drivers of EU fundamental rights law were less a genuine commitment on the part of the European institutions than private litigation and a mutual empowerment of European and national courts *vis-à-vis* Member State governments" (Augenstein, 2013, p.1920). This approach of the CJEU to human rights has been subjected to criticisms that fundamental rights has been "instrumentalised" by the CJEU through their interpretation in favour of economic integration (Coppel and O'Neil, 1992 cited in Augenstein, 2013, p.1921) and that human rights has served as a rhetoric that has enabled the Court to "preserve" the EU's market integration process rather than seeing human rights protection as a value in itself in (Williams, 2010 cited in Augenstein, 2013, p.1921-22).

As such, it is still questionable that to which degree the EU's social dimension can be premised upon "a different normative basis than that contained in the idea that the ultimate 'benchmark' for the 'performance' of a society is its ability to accumulate wealth in private hands" (van Apeldoorn, 2001 p.161).

Of course, despite the perception of welfare from an economic perspective, which has implications for EU law and for the ground on which the EU bases its existence (Williams, 2010, p.152), this is not to say that human rights do not have an important place in the EU, it is rather that the EU, under its current state of affairs, suffers from an institutional incompetence to adequately reflect its discourse into policy and practice as put by Williams (2010, p.153). Therefore, as it was suggested

[35] For instance, African Charter on Human and Peoples' Rights; the Arab Charter on Human Rights; the 1992 Rio Declaration on Environment and Development; the 1993 Vienna Declaration and Programme of Action; the 2000 Millennium Declaration; the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document and the 2007 Declaration on the Rights of Indigenous Peoples https://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf.

by several scholars, this issue should be debated in the political space and new formulas should be considered.

### 4.5. Concluding Remarks

In the lights of the forgoing arguments, it can be concluded that starting points for human rights protection mechanisms in regional integration projects with a strong economic dimension are mostly economic integration related as illustrated in the example of non-discrimination clauses regarding working life and citizenship rights that mainly originated from free movement regimes. Notwithstanding the political character of the results, the origin of many developments considered as political are in fact, to a certain degree, related with economic integration. Therefore, the close link between the economic and the political should be highlighted as "'political' […] refer[s] to efforts at creating political communities on various levels of the world system; but de-politicisation or deregulation is nevertheless also political in its redistributive consequences" (Söderbaum and Sbragia, 2010, p. 572).

As a part of European regionalisation, the EU represents an important example of regional integration with economic, political and social dimensions. However, it seems that its trademark has been mostly its economic integration. The EU's approach to human rights has remarkably relied on its economic integration logic and "the contingency of human rights protection on the promotion of market values" becomes explicit in a regional integration, which bases its one column on a common market and has advanced its legal integration by means of market freedoms (Augenstein, 2013, p. 1918-19). This logic is more apparent in the CJEU's case-law than other developments as litigations brought before the Court reflects economic dimension of integration. However, in other spaces that the EU evolved its human rights approach, there are implications of this logic since they relate issues like legitimacy of the EU polity to secure integration. This argument derives from the fact that the polity in which economic integration operates should be rendered and perceived legitimate.

To continue to maintain its legitimacy, the EU should not avoid challenges of its economic integration, as illustrated above. As part of this effort, it should continuously review its human rights approach in the face of its economic integration.

De Burca argues that the crisis that the EU started to experience after 2007 was the most critical crisis in its history, which brought along the question of the EU's *"raison d'etre"* (de Burca, 2013, p.1). In this regard, she argues that the EU model has the potential to balance economic globalisation with social democracy, which relates both its internal and external policies and that the EU can struggle with global challenges by virtue of its capacity, which it has developed throughout its integration process (2013, p.9) On the other hand, Fabbrini sees political and institutional drawbacks among the reasons of ineffectiveness of the EU regarding human rights protection (Fabbrini, 2016, , p.20). Therefore, he suggests that the EU's institutional order should be rearranged "to enhance the functioning of the EU system of governance" not only with respect to fiscal rules as it was argued in the context of Euro-crisis, but also for human rights protection (Fabbrini, 2016, , p.20). This is seen necessary by Fabbrini because of backsliding of human rights in several Member States in recent years (2016, 19.*et seq*.).

Given the capabilities of the EU to deal with many challenges, the prevailing economic vision of the EU regarding human rights can be compensated. Despite the debates on its success or failure, the EU economic integration has had a social dimension and although it can be argued that economic integration model of Europe is possible for other regions, the EU remains as the most significant example in terms of its human rights protection. Thus, the evolution process of human rights in the EU gives much to expect for more.

# CHAPTER 5

# CONCLUSION

The history of the EU is a source of inspiration with its achievements in numerous areas. It not only secured peace and provided prosperity for is people in the aftermath of the World War II by integrating its members' economies and by providing a community vision with political ambitions, but it also continued to develop and turned into an entity that deals with issues encompassing human rights, democracy, good governance, science, technology, education, environmental protection and so on while also increasing the level of cooperation with regard to migration, justice, security, fight against terrorism and foreign policy issues. While facing crises and challenges, it could become a global actor with a significant presence on several international platforms. Although it has experienced some drawbacks in recent years, such as economic crisis, refugee crisis, terror attacks, anti-democratic and populist trends in member states and Brexit process, it is still a powerful actor capable of changing not only its member states but also the countries that it interact.

Nonetheless, this may seem as a glorified depiction when its failures and mistakes are taken into consideration. One of the criticisms towards the EU has been its approach to human rights. In several contexts, such as migration issues and recent refugee crisis as well as its enlargement policies, it has been argued that it instrumentalises human rights. Indeed, its approach to human rights is a highly controversial issue. Whether they are rightful or not, however, the prominent point in this thesis is its intense engagement with human rights despite the criticisms that surround it.

Why the EU has developed a mature human rights system despite the fact that human rights issues purposefully excluded from the EEC framework (de Burca,

2011)? While de Burca argues that this decision was a choice that prefers an incremental progression of integration process (2011) it is not evident from its history that this intention had always been kept. Rather, its history shows that its human rights protection path has mainly dependent upon other events that are seemingly not directly related with an autonomous human rights discussion. In fact, as it can clearly be observed in the CJEU case-law, especially initial human rights protection logic of the EU primarily contingent upon its integration logic. Claiming the autonomy, supremacy and direct effect of EU law it aimed at securing integration, which has had a strong economic dimension from the outset. On the other hand, human rights were inevitably construed by an economic integration logic because of the limits of EU law. Unfortunately, this perspective seems still alive in the EU legal order. Furthermore, human rights related developments that seems remote to economic integration concerns are actually closely linked with it as economic, political and social dimensions of integration are strictly related to each other. Therefore, throughout this thesis, it was tried to be demonstrated that the EU's economic integration has inevitably conditioned its human rights approach.

To this end, in Chapter 2, the history of the EU's human rights journey was covered. The history shows that the EEC framework excluded a comprehensive human rights approach and it only envisaged market freedoms along with non-discrimination clauses on the grounds of sex and nationality, which were related with the implementation of market freedoms. Despite this limited competence with regard to human rights, thanks to its supranational institutions, it extended the scope of protection. While the CJEU took the lead by way of deciding upon litigations, the other institutions also played important roles that helped to promote human rights. The main intentions behind these developments were responding to the claims of member state judiciaries as well as the ECtHR to defend EU law and addressing the challenges that could be posed by a legitimacy problem. Beginning from the SEA, the EU started consolidate its integration with more political and economic goals and human rights started to be an important agenda item especially from the 1990s on. With the heating legitimacy debate in 1990s, human rights were attributed more and more importance. After the innovative provisions of the Maastricht Treaty regarding human rights and

regional citizenship, reforms continued with the Amsterdam and Nice Treaties. The long awaited Charter of Fundamental Rights was adopted in 2000, setting out a list of rights. Although the Draft Constitutional Treaty failed to take effect in 2004, the Lisbon Treaty kept much of its essence and it carried the EU to the peak of its human rights protection, albeit with some flaws. Importantly, Lisbon granted the Charter of Fundamental Rights a binding legal status as well as envisaging the accession of the EU to the ECHR. Although all these developments are important achievements for human rights, the initial logic of human rights protection of the EU can still be observed as an underlying theme of integration process, especially when the discussions that surrounds these novel arrangements are taken into consideration. Hence, further research and analysis for fully understanding these developments was required in connection with economic integration since this thesis asks whether economic integration influenced the development of the EU's human rights approach.

In Chapter 3, economic integration and human rights link was addressed outside the EU context by adopting comparative regionalism perspective and reviewing the literature on this relationship in global context and Mercosur context, respectively. By doing so, it was revealed that there is a close link between economic integration and human rights and this link is inevitably requires addressing it one way or another. Especially regional integration projects with a community perspective in addition to a strong economic dimension are likely to address this link as part of social dimension of their integrations. In this context, the Mercosur case indicated that there are some similarities between regional integration projects with political and social aspects in addition to economic dimension, because economic integration brings along economic and social rights as well as regional citizenship rights as a result of free movement regime. Nevertheless, apart from this common pattern, the EU and Mercosur are considerably different regional organisations in terms of their legal and institutional frameworks, and corollary to this, as regards their human rights dimension. Even though Mercosur has been influenced by the EU model of integration, especially because of its intergovernmental character, its law and institutions and the interplay between them present a rather distinct view when

compared to the EU. This difference makes clearer the unique path that the EU has followed as well as the important place of its law and institutions in its integration.

Lastly, in Chapter 4, the previous chapters' findings were combined to argue that the EU's human rights approach and the course of developments regarding human rights have been in close connection with economic integration related issues. In the light of the findings of previous chapters, it was put forward that the EU's strong supranational institutions and its law made it possible to advance human rights protection within the EU, albeit mainly for defending integration. Therefore, it has followed a unique path of development for human rights protection. However, it was argued that it also shares some common features with other market integration models as it has come up against the problem of balancing its economic integration with a social dimension, which includes rights protection. Since the EU has always been more than an economic project, it introduced several mechanisms that helped to balance its economic, social and political dimensions. In fact, because of the relationship among all these dimensions, they have fortified each other in terms of rights protection. On one hand, economic integration provided a basis to accord economic and social rights, as well as regional citizenship rights, political integration, on the other, enabled to preserve and enhance integration with its all dimensions by also extending the scope of rights protection. Meanwhile, as economic integration has constituted an important part of EU integration process, the EU's unique path has also been bounded by the landmarks set by economic integration rationale. Consequently, its approach towards human rights has been influenced by its market vision, leading imbalances against human rights. The thesis concluded by addressing this challenge, which is among the most salient criticisms with regard to the EU's human rights approach.

To sum up, according to the findings of this thesis, economic integration both contributed to the development of rights by initial market freedoms and non-discrimination clauses and restrained the approach towards them by seeing them through the ultimate internal market vision. While the human rights system of the EU has developed by means of the possibilities unique to its law and institutional design and as a reaction to the challenges that threatened integration –i.e. member state judiciaries and legitimacy- the substance of this development has been highly

influenced by economic integration logic of the EU. It is not argued here that the EU human rights system has been advanced only because of or for the service of economic integration. Nor it is contended that human rights approach has not been responsive to the needs of political and social dimensions of integration. It is argued that the approach towards human rights has been formed in a responsive manner to the needs of economic integration. Given the fact that the first treaty provisions that fall under the scope of human rights were related with market freedoms and that social dimension of economic integration has been a continuous concern in the EU, it can easily be argued that the relationship between economic integration and human rights has been clearly played a role and economic and social rights have been entering points for human rights protection in the EU. However, as the EU is also a political community, its efforts have not been limited to mitigate the unease regarding economic integration and steps also have been taken to strengthen the EU as a politically capable organisation by recognizing civil and political rights that would hold European people together with an intention to create a sense of belonging to EU polity. On the other hand, as the increasing political capability of the EU has also helped to fortify economic integration and the success of economic integration has helped to fortify political integration –because of the relationship between them- human rights issues have continued to be sensitive to economic integration. For this reason, it has always been an underlying theme while protecting and promoting human rights.

Such a dependant process suggests a logic that prioritise market "values" in the face of human rights. Although my argument is not that the EU's human rights system favours only market-friendly rights, it is still open to discussion that as an assertive actor with regard to human rights protection whether the EU protects these rights due to their inherent moral values. This is worth discussing when the EU's achievements with respect to human rights are taken into consideration independent from the argument that they developed as a result of a strong commitment - or haphazardly. The accumulated achievements of the EU in this area and its colossal polity with a capability to effect many lives on many issues calls for attention. There are many reasons that cause to arouse a demand for human rights protection in the EU. It is not just the fact that the EU has made many promises as regards human rights but also that

it evolved into a powerful entity that can violate the rights of people, both EU citizens and third-country nationals, and because of the potential effects of its both negative and positive integration on people's lives.

Within the light of these, my contention and proposal is that human rights should be protected in the EU as a value in itself and they should not be weighed in the scales of economic integration. Only after a sincere effort to address the criticisms that surround the EU's human rights approach can the EU claim to be a true protector of rights.

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# APPENDICES

## A. TURKISH SUMMARY / TÜRKÇE ÖZET

Avrupa Birliği (AB), II. Dünya Savaşından sonraki süreçte, savaşın yarattığı yıkımı onarmak ve Avrupa ülkeleri arasındaki rekabeti sona erdirerek barışı sağlamak üzere yola çıktığı günden bu yana ilgi çekici bir siyasi ve ekonomik bütünleşme örneği olmayı sürdürmektedir. Birleşmiş ve güçlü bir Avrupa ülküsü doğrultusunda, dönemin liderleri ve etkili figürleri sadece ekonomi ve savunma gibi alanlarda uluslararası bir işbirliğini değil; demokrasi, insan hakları ve hukukun üstünlüğü gibi ilkeler çerçevesinde bir siyasi boyutu da olan güçlü bir bütünleşme modeli yaratmayı hedeflemiştir. Öte yandan, Avrupa'nın geleceğine ilişkin büyük fikirlere rağmen, II. Dünya Savaşını takiben ortaya konulan tüm hedefler gerçekleştirilememiştir. 1949 yılında demokrasi, insan hakları ve hukukun üstünlüğü ilkeleri doğrultusunda on Avrupa devleti (Almanya, Fransa, İtalya ve Benelüks ülkelerinin yanı sıra Birleşik Krallık, Danimarka, İsveç ve Norveç) tarafından hükümetler arası bir yapı olan Avrupa Konseyi (AK), Fransa, Almanya, İtalya ve Benelüks ülkeleri tarafından yeterli düzeyde bir siyasi işbirliği olarak nitelendirilmediğinden bu ülkelerce daha yakın bir işbirliği modeli inşa edilmesi hedeflenmişse de, 1952'de imzalanan Avrupa Savunma Topluluğu Antlaşması ve ardından 1953'te imzalanan Avrupa Siyasi Topluluğu Antlaşması ile oluşturulması planlanan güçlü yapı, 1954'te Fransa'nın yasama organı tarafından Avrupa Savunma Topluluğu Antlaşması'nın onaylanmaması üzerine hayata geçirilememiştir. Bu gelişmelerin ardından, 1951'de Avrupa Kömür ve Çelik Topluluğu'nu (AKÇT) kuran Paris Antlaşmasına ek olarak daha dar kapsamlı hedeflerle 1957'de Roma Antlaşması ile Avrupa Ekonomik Topluluğu (AET) ve Avrupa Atom Enerjisi Topluluğu (EAEC / Euratom) kurulmuştur. Roma Antlaşması, üye devletler ve onların halkları arasında daha yakın bir birlik yaratma vizyonuyla,

yalnızca ortak bir pazar değil, aynı zamanda uluslarüstü kurumlara sahip bir siyasi topluluk da kurmuştur. Buna rağmen, Avrupa Siyasi Topluluğu Antlaşması taslağının insan hakları koruma mekanizmalarını da içeren güçlü siyasi hedefleri Roma Antlaşmasının yasal çerçevesinde yer bulamamıştır. Yine de AB, yıllar içerisinde gelişmiş bir insan hakları sistemi oluşturmuştur. Bu sistemin, bütünüyle bütünleşme sürecinin başlangıcındaki ideallere dayanarak mı yoksa başka nedenlerle mi geliştirildiği ise merak uyandırmaktadır. Zira söz konusu sistemin gelişmesine katkı sunan tarihsel gelişmeler göz önüne alındığında, bu gelişmelerin önemli bir kısmının doğrudan insan haklarını koruma amacına yöneldiğini söylemek güçtür. Özellikle AB'nin öne çıkan özelliklerinin başında gelen güçlü ekonomik bütünleşme boyutu dikkate alındığında, AB'de yaşanan tüm gelişmeleri, ve elbette bunların arasında insan haklarına ilişkin gelişmeleri, söz konusu boyutun diğer unsurlarla ilişkilerini ve onlara muhtemel etkilerini inceleyerek ele almak gerekmektedir. Bu çerçevede, kendine özgü hukuku ve kurumlarıyla AB bütünleşmesinin karakteri ve izlediği yol üzerinde durulması önemlidir.

Başlangıçta, AB yeni bir tür siyasi ve kurumsal yapı olarak bütünleşme için sağlam bir temel oluşturmak zorundayken, daha sonra yeni üyeler ve yeni yetkilerle genişleyen ve büyüyen bir Birlik olarak meşruiyetini iddia etme konusunda daha büyük zorluklarla karşı karşıya kalmıştır. Buna paralel olarak, diğer konuların yanı sıra insan haklarıyla ilgili endişeler de en çok tartışılan konulardan biri haline gelmiştir. İç ve dış insan hakları politikaları arasındaki tutarsızlıklar, çeşitli hak ve özgürlüklerin yetersiz düzeyde korunması, dış ilişkilerde insan hakları konusunda farklı ülke ve bölgelere yönelik farklı tutumlar ile alandaki tartışmalı eylem ve politikalar AB'nin maruz kaldığı eleştiriler arasında yer almaktadır. Bu bağlamda, bir başka eleştiri, AB'de iç pazara atfedilen önemin AB'nin insan haklarına yaklaşımına yansımalarına işaret etmektedir. Sınırlarının ötesindeki hayatları da etkileyen güçlü bir küresel aktör olarak AB'nin insan haklarına yaklaşımının nasıl geliştiği ve güçlü ekonomik boyutu ile bütünleşme sürecinin bu yaklaşımı nasıl etkilediği incelenmeye değer bir konudur.

AB, siyasi yönü yanında önemli bir ekonomik boyutu olan bölgesel bir bütünleşme projesidir. Esasen, insan hakları meselelerine aktif bir katılım, hem siyasi

hem de ekonomik boyutları olan bölgesel işbirliği ve bütünleşme projelerinin ortak bir özelliği olmamasına rağmen, AB'nin gelişmiş bir insan hakları sistemine sahip olduğu görülmektedir. AB bütünleşmesinin siyasi -ve sosyal- boyutları olmakla birlikte, insan haklarının kademeli olarak gelişmesinin tamamen insan haklarını koruma arzusunun sonucu olarak mı yoksa güçlü ekonomik boyutun da sürece etkisiyle mi geliştiği sorusu dikkat çekmektedir. Bu bağlamda, bu tez AB'deki ekonomik bütünleşme ve insan hakları arasındaki ilişkiyi anlamayı ve AB'nin ekonomik bütünleşme mantığının AB içindeki insan hakları yaklaşımının gelişimini ne ölçüde (ve nasıl) etkilediğini araştırmayı amaçlamıştır. Buna göre tezin temel araştırma sorusu şudur: AB'nin ekonomik bütünleşmesi insan hakları yaklaşımının gelişimini etkiledi mi? Bu soruya cevap bulmak için tez ayrıca; AB'nin insan hakları sistemi nasıl gelişti? AB'de insan haklarına önem vermenin nedenleri neydi? Ekonomik bütünleşme ile insan hakları arasında bir ilişki var mı? AB ile insan hakları açısından güçlü bir ekonomik boyutu olan diğer bölgesel bütünleşme projeleri arasında benzerlikler var mı yoksa AB bu konuda benzersiz bir örnek mi? sorularını da sormaktadır.

Bu sorular ışığında ilk olarak Bölüm 2'de AB'nin insan hakları yaklaşımının tarihsel gelişimi değerlendirilmiştir. AET'den başlayarak, süreçteki önemli gelişmeler özetlenmiş; bu bağlamda, AB kurumlarının süreçteki rolü ve önemli anlaşma değişiklikleri ele alınmıştır. Böylelikle, tezin araştırma sorusuna cevap vermek üzere bu gelişmelerin tartışılması için bir zemin hazırlanmıştır.

AB bütünleşmesinin en öne çıkan yönlerinin başında güçlü bir ekonomik boyuta sahip olması bulunduğundan ve bu tez insan hakları yaklaşımının gelişiminin güçlü bir ekonomik boyutu olan bir bölgesel bütünleşme projesinde nasıl gerçekleştiğini anlamayı amaçladığından, Bölüm 3'te, insan hakları ve ekonomik bütünleşme arasındaki ilişki genel olarak ele alındıktan sonra, hem ekonomik bütünleşme hem de insan hakları boyutlarını içeren bir başka bölgesel bütünleşme olan Güney Ortak Pazarı'nda (Mercosur) bu bağlantı, ilgili literatür taranarak, karşılaştırmalı bölgeselcilik perspektifinden incelenmiştir. Bu bölümde, AB ve Mercosur örnekleri arasında tam bir karşılaştırma yapılmadan, yalnızca, literatür taramasının özellikle ekonomik bütünleşme ve insan hakları arasındaki ilişkiyi ortaya

koyarak AB örneğine ışık tutacak yönleri üzerinde durulmuştur. Bu çerçevede, AB ve Mercosur'un zıtlıkları ve benzerlikleri vurgulanmıştır.

Bölüm 4'te, AB'nin ekonomik bütünleşmesinin insan hakları yaklaşımıyla ve bu alandaki gelişmelerle ilgisi, AB'nin insan hakları yaklaşımının gelişim tarihine ilişkin değerlendirmelerden ve literatür taramasının sağladığı bulgulardan yararlanılarak ele alınmış; bu doğrultuda, AB'nin ekonomik bütünleşme mantığının, insan hakları yaklaşımı üzerinde belirleyici bir role sahip olduğu savı ortaya konulmuştur. Bu sonuca varmak için öncelikle Mercosur ve AB yolları arasındaki benzerlik ve farklılıkların insan hakları yaklaşımları üzerindeki etkileri vurgulanmış, ardından, AB'nin ekonomik bütünleşme mantığının insan hakları yaklaşımının gelişimine etkisi eleştirel bir şekilde tartışılmıştır.

Bu çerçevede, tezin temel bulguları ve tez boyunca tartışılan konular şu şekilde özetlenebilir:

AB'de insan hakları bakış açısının tarihsel gelişimine bakıldığında, 1957 tarihli Roma Antlaşması ile kurulan AET'nin kapsamlı bir insan hakları yaklaşımına sahip olmadığı, Roma Antlaşması'nın yalnızca mal, hizmet, sermaye ve insanların serbest dolaşımlarına ilişkin piyasa özgürlüklerine ve bunların hayata geçirilmesine yönelik cinsiyet ve uyrukluk temelinde ayrımcılık yapmama hükümlerine yer verdiği görülmektedir. İnsan hakları konusundaki bu sınırlı düzenlemelere rağmen, AET ilk dönemlerinden itibaren uluslarüstü kurumları sayesinde insan haklarına ilişkin korumanın kapsamını genişletmiştir. Dolayısıyla, başta Avrupa Birliği Adalet Divanı (ABAD) olmak tüm AB kurumları, insan haklarının geliştirilmesine yardımcı olan önemli roller oynamıştır. Fakat yine tarihsel olarak bakıldığında bu gelişmelerin arkasındaki asıl amacın, üye ülke yargılarının yanı sıra AİHM karşısında AB hukukunu savunmak ve yeni bir siyasi ve kurumsal yapı olan Birlik'in meşruiyet sorununun yaratabileceği zorlukları aşmak olduğu anlaşılmaktadır. Avrupa Tek Senedi'nden başlayarak AB bütünleşmesi küresel zorlukları aşmak için yeni siyasi ve ekonomik hedeflerle güçlendirilmeye başladıktan sonra, artan Birlik yetkilerine ve Birlik faaliyetlerinin üye devlet vatandaşlarından kopukluğuna bir tepki olarak 1990'lı yıllarda alevlenen meşruiyet tartışması ile insan haklarının giderek daha önemli bir gündem maddesi haline gelmesi de, insan haklarının AB'nin başka sorunlarına aranan

çözümlerin bir parçası olarak ele alındığı görüşünü pekiştirmektedir. Bu bağlamda, Soğuk Savaş'ın sona ermesinin ardından gündeme gelen Orta ve Doğu Avrupa ülkelerinin Birlik'e katılımını da önemli bir etken olarak dile getirmek mümkündür. Böyle bir arka planda, Maastricht Antlaşması'nın insan hakları ve bölgesel vatandaşlıkla ilgili yenilikçi hükümlerinden sonra, Amsterdam ve Nice Antlaşmaları ile devam eden reformlar, 2007 yılında imzalanan Lizbon Antlaşması ile güçlü bir hukuki çerçeveye yerleştirilerek sonuçlandırılmıştır. Her ne kadar, 2004 yılında imzalanan Taslak Anayasa Antlaşması Hollanda ve Fransa'da gerçekleştirilen referandumlarda kabul edilmediğinden yürürlüğe giremese de, Lizbon Antlaşması, Taslak Anaysa Antlaşması'nın reformlarının özünü koruyarak AB'yi sahip olduğu en gelişmiş insan hakları sistemine kavuşturmuştur. Özellikle, 2000 yılında Nice'te ilan edilen Temel Haklar Şartı'na Kurucu Antlaşmalar ile aynı hukuki statüyü kazandırarak ve AB'nin AİHS'ye taraf olmasını öngörerek, Birlik'te insan haklarına ilişkin olarak uzun süredir tartışmaları devam eden iki konuyu, bazı eksikliklerle olsa da, çözüme kavuşturmuştur. Tüm bu gelişmeler insan hakları açısından önemli başarılar olsa da, AB'de insan haklarının korunması, bu yeni düzenlemeleri çevreleyen tartışmalar da göz önünde bulundurularak, bütünleşme sürecinin önemli bir boyutu olan ekonomik bütünleşme konusu ile birlikte değerlendirilmelidir.

Öte yandan, küresel ve bölgesel düzeyde ekonomik liberalleşme ve ekonomik bütünleşme olgularının insan hakları ile bağlantısı incelendiğinde, söz konusu olguların kaçınılmaz olarak sosyal anlamda bazı olumsuz sonuçlar doğurduğu ve bu olumsuz sonuçlara maruz kalan kişilerin dezavantajlı durumunu dengelemek adına birtakım hakların öngörülmesi gerektiği yönünde tartışmalar bulunduğu görülmektedir. Özellikle küreselleşme ile birlikte artan uluslararası ve bölgesel serbest ticaret antlaşmalarıyla ortaya çıkan dengesizliklerin; ekonomik özgürlüklerin, sosyal ve siyasi alanlarda gerekli adımlar atılarak sınırlanması veya düzenlenmesi yoluyla giderilmesi küreselleşme çağının önemli tartışma konulardan biri olmuştur. Örneğin, kalkınma meselesinin sadece ekonomik bir perspektiften ele alınmaması, insan haklarının da kalkınma hedefleri belirlenirken dikkate alınması gerektiği küresel düzeyde Birleşmiş Milletler Sürdürülebilir Kalkınma Hedefleri bağlamında ortaya konulmaktadır. Benzer şekilde, bölgesel düzeyde de kalkınma, insan hakları ile sıkı

bir bağlantı içinde ele alınmaktadır. Hatta hem küresel düzeyde hem de çeşitli bölgesel yapılarda kalkınma, bir insan hakkı olarak tanınmaktadır. Özellikle güçlü bir ekonomik boyuta ek olarak bir topluluk bakış açısına sahip olan bölgesel bütünleşme projelerinin, hakların korunması yönünde bir yaklaşımla ekonomik bütünleşme ve insan hakları ilişkisini ele alma eğiliminde olduğu görülmektedir. Bu bağlamda, insan haklarının, başlı başına bir siyasi ve felsefi değer taşıyan bir olgu olarak değil de sadece ekonomik özgürleşme bağlamında ele alınmasının, insan haklarının sadece "piyasa dostu haklar" veya ekonomik düzenlemelerin bir alt başlığı olarak ya da sadece söylem düzeyinde korunması gibi riskleri de beraberinde getirdiği vurgulanarak, ticari özgürleşmenin ve ekonomik bütünleşmenin insan haklarının korunması konusundaki yaklaşımlara ne şekilde etki edebileceği de ortaya konulmuştur.

Söz konusu genel çerçeveye ek olarak, Mercosur örneği, ekonomik boyutunun yanı sıra bir topluluk bakış açısına sahip olan ve siyasi ve sosyal yönleri de bulunan bölgesel bütünleşme projeleri arasında bazı benzerlikler olduğunu; ekonomik bütünleşmenin, ekonomik ve sosyal hakların yanı sıra serbest dolaşım rejiminin bir sonucu olarak bölgesel vatandaşlık haklarını da beraberinde getirebildiğini göstermektedir. Bununla birlikte, AB ve Mercosur, yasal çerçeveleri ve kurumsal yapıları bakımından oldukça farklı bölgesel örgütler olduğundan, insan hakları koruma mekanizmaları açısından iki örgüt arasında önemli farklılıklar bulunmaktadır. Mercosur, bir bölgesel bütünleşme modeli olarak AB'den etkilenmiş olsa da, farklı bir hukuki ve kurumsal çerçeveye sahiptir. Özellikle hükümetler arası karakteri nedeniyle topluluk hukuku ve kurumlarının yanı sıra bunlar arasındaki etkileşim bakımından da AB ile karşılaştırıldığında oldukça farklı bir görünüm arz etmektedir. Ancak söz konusu farklılık, AB'nin insan hakları yaklaşımının gelişimindeki özel koşulları daha belirgin hale getirerek konuya ilişkin olarak Birlik'teki tarihsel gelişmeleri yorumlamaya yardımcı olmaktadır. Örneğin, AB hukukunda benimsenen doğrudan etki, AB hukukunun üstünlüğü ve yetki ikamesi gibi ilkeler ile AB'de uluslarüstü kurumların varlığı ve işleyiş biçimlerinin sürece etkisi, daha belirgin bir şekilde ortaya çıkmaktadır. Buna ek olarak, bu farklılığa rağmen Mercosur'da insan hakları söyleminin ve sosyal koruma mekanizmalarının önemli bir yer bulmasının, ekonomik

bütünleşmeyle gelen sosyal dengesizlikleri ve bunların hakların korunması yönünde bir gelişmeye yol açmasının muhtemel olmasını da daha belirgin bir şekilde ortaya koyduğunu söylemek mümkündür.

AB başlangıcından bu yana bir ekonomik projeden fazlası olduğu için, ekonomik, sosyal ve siyasi boyutlarını dengelemeye yardımcı olan çeşitli mekanizmalar geliştirmesi, bütünleşme sürecini sağlıklı bir şekilde sürdürülebilmek için kaçınılmaz olmuştur. Tüm bu boyutlar arasındaki etkileşimin ise, hem birbirlerini hem de Birlik içindeki insan hakları korumasını güçlendirdiği görülmektedir. Hatırlatmak gerekirse, AB'nin güçlü hukuku ve uluslarüstü kurumları, esasen bütünleşmeyi savunmak için de olsa, AB içinde insan hakları korumasını geliştirmeyi mümkün kılmıştır. Bir yandan ekonomik bütünleşme, ekonomik ve sosyal hakların yanı sıra bölgesel vatandaşlık haklarının ortaya çıkması için bir temel oluşturmuş, diğer yandan siyasi bütünleşme, hakların korunmasına ilişkin kapsamı da genişleterek tüm boyutları ile bütünleşmeyi korumayı ve geliştirmeyi sağlamıştır. Fakat ekonomik bütünleşme, AB bütünleşme sürecinin önemli bir parçasını oluşturduğundan, AB'de insan haklarının korunması, ekonomik bütünleşme mantığının belirlediği sınırlar içinde kalmıştır. Sonuç olarak, AB'de insan haklarına yönelik yaklaşım, serbest piyasa vizyonundan etkilenmiş ve bu vizyon insan hakları aleyhine bazı dengesizliklere yol açmıştır. Dolayısıyla, AB'nin insan hakları yaklaşımına ilişkin en çarpıcı eleştirilerden biri, insan hakları ve ekonomik bütünleşme arasında bir çatışma yaşandığında, dengenin ekonomik bütünleşme lehine kurulması olmuştur.

Özetlemek gerekirse, bu tezin bulgularına göre, ekonomik bütünleşme hem başlangıçtaki piyasa özgürlükleri ve ayrımcılık yapmama hükümleri ile hakların gelişimine katkıda bulunmuş hem de nihai iç pazar vizyonu ve AB hukukunun çizdiği çerçeve nedeniyle bunlara yönelik yaklaşımı sınırlandırmıştır. AB'nin insan hakları sistemi, hukukuna ve kurumsal tasarımına özgü olanaklar aracılığıyla ve bütünleşmeyi tehdit eden zorluklara –özellikle yargı organları arasındaki rekabet be meşruiyet sorunu- bir tepki olarak gelişirken, bu gelişmenin özü, AB projesinin baskın yönlerinden biri olan ekonomik bütünleşme mantığından oldukça etkilenmiştir. Belirtmek gerekir ki, burada tartışılan, AB insan hakları sisteminin yalnızca ekonomik bütünleşme nedeniyle veya buna hizmet etmek üzere geliştirildiği ya da AB'nin insan

hakları yaklaşımı belirlenirken, bütünleşmenin siyasi ve sosyal boyutlarına önem ve ağırlık verilmemesi olmayıp insan haklarına yönelik yaklaşımın, ekonomik bütünleşmenin ihtiyaçlarına duyarlı bir şekilde şekillendiğidir. İnsan hakları kapsamında değerlendirilebilecek ilk antlaşma hükümlerinin piyasa özgürlükleri ile ilgili olduğu ve ekonomik bütünleşmenin sosyal boyutunun AB'de sürekli bir gündem konusu olduğu göz önüne alındığında, ekonomik bütünleşmenin insan haklarına bakış açısında önemli bir rol oynadığını ve ekonomik ve sosyal hakların, AB'de insan haklarının korunması için bir başlangıç noktası oluşturduğunu ifade etmek mümkündür. Bununla birlikte, AB aynı zamanda siyasi bir topluluk olduğu için, çabaları ekonomik bütünleşme ile ilgili tedirginlikleri yatıştırmakla sınırlı kalmamış ve Avrupa halklarının Birlik'e aidiyet duygusu taşımasını sağlayacak medeni ve siyasi hakları tanıyarak AB'yi güçlendirmek için de adımlar atılmıştır. Öte yandan, AB'nin artan siyasi kapasitesi, önemli politika ve hedefleri hayata geçirmeyi sağlayarak ekonomik bütünleşmenin; keza ekonomik bütünleşmenin başarısı da Birlik üye ve vatandaşlarının projenin olumlu etkilerini somut olarak algılayabilmesini sağlayarak siyasi bütünleşmenin güçlendirilmesine yardımcı olduğundan, insan hakları konuları ekonomik gelişmelere ve ekonomik özgürlüklerin korunmasına duyarlı olmaya devam etmiştir. Bu nedenle, ekonomik bütünleşme ve iç pazarın sağlıklı bir şekilde işlemesini temin eden ekonomik özgürlükler, insan haklarını korurken ve geliştirirken her zaman önemli bir alt metin olmuştur.

Sonuç olarak; 1952 yılında imzalanan Avrupa Siyasi Topluluğu Antlaşması'nın hayata geçirilememesinin ardından insan hakları konusunun kasıtlı olarak 1957 tarihli Roma Antlaşması dışında bırakılmasına rağmen, zamanla insan hakları korumasına ilişkin mekanizmalar oluşturulmuş ve Birlik'te insan haklarının korunması söylemi giderek güçlenmiştir. Ancak söz konusu gelişmelere bakıldığında, bunların bağımsız bir insan hakları tartışmasıyla doğrudan bağlantılı olmaktan ziyade AB bütünleşmesiyle ilgili diğer olaylarla bağlantılı olduğu görülmektedir. ABAD içtihat hukukunda açıkça görülebileceği gibi, Divan, AB hukukunun özerkliğini, üstünlüğünü ve doğrudan etkisini iddia ederek, başından beri güçlü bir ekonomik boyuta sahip olan bütünleşme projesinin meşruiyetini ve gücünü korumayı amaçlamıştır. Böyle bir durumda insan hakları, AB hukukunun sınırları nedeniyle

kaçınılmaz olarak ekonomik bütünleşme mantığıyla yorumlanmış görünmektedir. Ne yazık ki, bu perspektif AB hukuk düzeninde başlangıçta olduğu gibi günümüzde de etkisini sürdürmektedir. Bunun önemli bir nedeni olarak, AB'nin varlık amacını ikna edici bir şekilde ortaya koymak konusunda yaşadığı sorunları göstermek mümkündür. Son yıllarda yaşanan krizler (ekonomik kriz, terör, göç, iltica, popülist sağ siyasetin güçlenmesi, Brexit gibi) Birlik'in bu anlamdaki ikna ediciliğini zorlamaktadır. Dahası, ekonomik bütünleşme endişelerinden uzak görünen insan haklarıyla ilgili gelişmeler, bütünleşmenin ekonomik, siyasi ve sosyal boyutları birbiriyle sıkı sıkıya bağlantılı olduğundan aslında insan hakları ile de yakın bir bağlantı içerisindedir. Dolayısıyla bu tez boyunca AB'nin ekonomik bütünleşmesinin kaçınılmaz olarak insan hakları yaklaşımını şekillendirdiği gösterilmeye çalışılmıştır.

Böyle bir bağımlılık, insan hakları karşısında piyasa "değerlerine" öncelik veren bir mantık doğurmaktadır. Bu tezde, AB'nin insan hakları sisteminin yalnızca "piyasa dostu haklar"ı desteklediği ileri sürülmemekle birlikte, insan haklarının korunmasına ilişkin iddialı bir aktör olarak AB'nin bu hakları ahlaki, felsefi ve siyasi değerlerinden dolayı koruduğunun tartışmaya açık olduğu savunulmaktadır. İnsan hakları alanında tüm kusurlarına rağmen ciddi başarılar elde etmiş ve küresel düzeyde pek çok alanda ülkelerin, toplumların ve bireylerin yaşamı etkileme gücü olan AB'nin insan haklarına yaklaşımı son derece önem arz eden bir konudur. Burada tartışmaya değer olan, kendi içinde güçlü bir insan hakları sistemi yaratmış olmasının yanı sıra insan haklarının korunmasını dış dünya ile ilişkilerinde dahi bir ilke olarak benimsemiş bir AB'nin, hem pozitif ve negatif bütünleşme ile pek çok alanda etki yaratabilecek hem de AB vatandaşlarının yanı sıra üçüncü ülke vatandaşlarının haklarını ihlal edebilecek bir potansiyele kavuşmuş küresel bir aktör olarak konuya nasıl yaklaştığıdır.

Tüm bu tartışmaların ışığında, AB'de insan haklarının başlı başına bir değer olarak korunması ve değerinin ekonomik bütünleşme karşısında ölçülmemesi gerektiği savunulmaktadır. AB, ancak insan hakları yaklaşımını çevreleyen eleştiriler doğrultusunda sorunlarını gidermeye yönelik samimi bir çaba harcadıktan sonra gerçek bir hak koruyucusu olduğunu iddia edebilecektir.

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**YAZARIN /** AUTHOR

**Soyadı** / Surname : Çelik
**Adı** / Name : Çiğdem
**Bölümü** / Department : Avrupa Çalışmaları / European Studies

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